

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 INTERNATIONAL BUSINESS MACHINES
CORPORATION,

: CIVIL ACTION

5 Plaintiff,

6 v

7 GROUPON, INC.,

: NO. 16-122-LPS

8 Defendant.

9 - - -
10 Wilmington, Delaware
Thursday, July 19, 2018
Jury Trial - Volume D

11 - - -
12 BEFORE: HONORABLE LEONARD P. STARK, Chief Judge, and a jury

13 APPEARANCES:

14 POTTER ANDERSON & CORROON, LLP
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STEPHANIE E. O'BYRNE, ESQ.

17 and

18 DESMARAIS, LLP
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17 P R O C E E D I N G S

18 (REPORTER'S NOTE: The following jury trial was
19 held in open court, beginning at 8:30 a.m.)

20 THE COURT: Good morning, everyone.

21 (The attorneys respond, "Good morning, Your
22 Honor.")

23 THE COURT: I understand there are some issues.
24 Anything from IBM?

25 MR. OUSSAYEF: Yes, Your Honor.

THE COURT: Good morning.

1 MR. OUSSAYEF: Good morning, Your Honor. Kareem
2 Oussayef for IBM.

3 We have some objections to the demonstratives
4 that were disclosed for the Dunham testimony, so I'd like to
5 take Your Honor through those and show you what our
6 objections are.

7 If we could pull up the Dunham demonstratives,
8 Mr. Kelly.

9 MR. DESMARAIS: Just use the Elmo.

10 MR. OUSSAYEF: Yes. Okay.

11 MR. DESMARAIS: Kareem, do you want these?

12 MR. OUSSAYEF: So before I go into the
13 demonstratives, Your Honor, I'll just show deposition
14 testimony from Mr. Dunham here.

15 So Mr. Dunham at his deposition told us that, on
16 line 7 here at page 90 of his deposition: Do you know one
17 way or another?

18 He says: I don't know the details of the deal
19 page. That's managed by another team.

20 And he goes on and say there is another team
21 that manages the deals page.

22 Now, when we look at his, the demonstratives
23 that were disclosed with him, we see that he is taking us
24 through the claim language on various claim elements
25 attempting to rebut Dr. Schmidt's testimony from yesterday.

1 THE COURT: Remind me of who Mr. Dunham is.

2 MR. OUSSAYEF: Excuse me. Mr. Dunham is
3 Groupon's corporate representative. He is a fact witness,
4 he is not an expert witness and hasn't been disclosed as
5 one. So what we're seeing here as the issue is even though
6 at his deposition he says I'm not an expert in the deal
7 page, I don't really know how it works, here he takes us
8 through with reference to specific claim elements and how
9 they apply under patent rules. He takes us through various
10 slides of Dr. Schmidt's testimony. And, you know, I can
11 only assume he is going to testify about why Dr. Schmidt is
12 incorrect.

13 He takes you through the architecture of
14 Groupon's system which apparently he did not know about at
15 his deposition but perhaps he has attempted to find out and
16 become an expert since, using documents that, this document
17 was disclosed to us in an illegible format.

18 THE COURT: Illegible.

19 MR. OUSSAYEF: Illegible, exactly. So that
20 document did not show that you could not read Gdoo or
21 Terada or DaaS or RaaS or any of those items in the version
22 disclosed to us.

23 Then here we have an example of where apparently
24 there is going to be a tutorial about how coding works with
25 reference to divs and what they do. And, Your Honor, we did

1 already have a situation where our fact witness tried to
2 testify about what a div was and there was an objection that
3 was sustained regarding the fact that he was not an expert
4 so he couldn't talk about divs.

5 Next, we look here and we have another example
6 from Dr. Schmidt's slides with apparently an X out through
7 the global container div. This appears to be a reference to
8 what opposing counsel argued on cross-examination or I
9 should say examined on cross-examination regarding what
10 would happen if you removed a div ID from Groupon's system.

11 And just to be clear, there has never been any
12 disclosure about any test about what would happen if the div
13 ID was removed, and there has never been any disclosure in
14 any expert report regarding what would happen in that
15 situation or anything of that nature.

16 Here, there appears to be another reference to
17 Dr. Schmidt's slides. And an argument about, you know, a
18 particular portion of the source code and what that would
19 do.

20 THE COURT: In general, it looks like this is
21 all mapping the claims on to Groupon's accused product. Is
22 that right?

23 MR. OUSSAYEF: Yes, this is rebuttal to our
24 expert. If they intend to have a rebuttal to our expert,
25 they should bring, they have their expert. They have an

1 expert that has already been disclosed in this case and he
2 has already identified certain theories.

3 I could go on, Your Honor. But the point here
4 is that we have a long list of slides here that all attempt
5 to rebut expert testimony. And it's important to realize
6 here, Your Honor, that there is a division between fact
7 witnesses and expert witnesses for a reason. And there are
8 two -- the case law says there are two important reasons for
9 it.

10 First, a fact witness is testifying about
11 particular facts. So those are things like what the real
12 world is, what exists, how things look, how things act, not
13 about in the future hypothetically if you were to delete the
14 global container div. If you were to change a system in the
15 future. Here is how technology generally works. Here is a
16 technology tutorial.

17 And so it's important for the jury because
18 you want to have someone who is qualified testify about
19 technical expertise, and it's important for the parties as
20 well because there are disclosure rules for experts.

21 We based our case based on the noninfringement
22 arguments and the validity arguments that opposing counsel
23 presented to us and that we discovered during expert
24 discovery and through expert reports.

25 If now Groupon intends to come here and present

1 noninfringement arguments that were not disclosed, we don't
2 have a fair chance to react to those situations.

3 Furthermore, Groupon has disclosed the entire
4 source code computer with literally thousands of source code
5 files as a potential exhibit with Mr. Dunham.

6 We have no idea how he might use those live in
7 court. He might pick any of the thousands of source code
8 files and tell us a story about how this file affects the
9 functioning of the system. We have no way to identify what
10 he might do in the future.

11 And, primarily, one of the things that the case
12 law specifically identifies is that if you have a corporate
13 representative who is now being brought as someone who will
14 now testify in expert testimony, there is no way to identify
15 what he is going to say.

16 Let's see. The case of Carpenter Technology v
17 Allegheny Technology, which is available on Westlaw at 212
18 WL 5507959 from the sister court in the Eastern District of
19 Pennsylvania in the Third Circuit as well discusses a
20 situation which is very similar to this in which a lay
21 witness from the corporation comes and testifies about how
22 various prior art systems makes things standard and easy to
23 do without actually saying the word "obvious" and without
24 actually explicitly connecting it to an expert opinion but
25 still taking it almost all the way there.

1 And what the Court said there is that is not
2 permitted. Even if you are not saying you are an expert
3 and even if you are not saying the words "infringement" or
4 "obviousness" or "invalidity," you are still going so close
5 that it prejudices the parties and it makes it impossible to
6 police the line between lay and expert testimony.

7 THE COURT: Okay. Thank you. I'll hear from
8 Groupon.

9 Good morning.

10 MR. HADDEN: Good morning, Your Honor. David
11 Hadden for Groupon.

12 Mr. Dunham is Groupon's senior engineering
13 manager. He was Groupon's 30(b)(6) witness on most
14 technical topics. He is not going to discuss claim
15 language. He is not going to offer an opinion on anything.
16 He is going to describe how Groupon's technology actually
17 works.

18 The slide that had the claim language is a slide
19 from Dr. Schmidt's presentation for, I'll give an example.

20 Dr. Schmidt got up and tried to explain what
21 this diagram, which is from a Groupon document, discloses
22 and describes about Groupon's systems and their operation.
23 And he described it incorrectly.

24 Mr. Dunham is going to get up and explain what
25 is exactly shown in this diagram and how Groupon's --

1 THE COURT: If you could use the microphone.

2 MR. HADDEN: I'm sorry. He is going to
3 explain how Groupon's system works. That's the point of the
4 diagram, and the diagram that they say was not disclosed.
5 This is just a bad printout. We just blew up some language.
6 This was both disclosed and it was incorporated into Dr.
7 Schmidt's own expert report.

8 So he has pages in his expert report where he
9 shows there is a Groupon document with various boxes around
10 it. So it's an internal Groupon document that they used to
11 train their engineers how their system is laid out. That
12 is what Mr. Dunham is going to talk about. So he is not
13 going to talk about claim language, he is not going to give
14 opinion about infringement. He is not to give an opinion
15 about obviousness or anything else. He is just going to
16 explain how Groupon's technology actually works. And
17 Dr. Schmidt said some things about how it works that is
18 technically wrong. The point of this trial is to get the
19 facts right, and Mr. Dunham is the person who knows and he
20 is going to describe it.

21 THE COURT: Well, why shouldn't I view how the
22 accused technology works as an issue of technical scientific
23 knowledge that is only proper for experts to talk about?

24 MR. HADDEN: Because it's not. It's a fact
25 issue. There are software systems at Groupon that were

1 developed by Mr. Dunham and his team. They operate in a
2 particular way. Mr. Dunham is the most knowledgeable fact
3 witness about how those systems operate. They had Mr.
4 Filepp in here describing how Prodigy operates right?

5 THE COURT: What about his testimony that was
6 shown apparently about the point he didn't know how deals
7 work.

8 MR. HADDEN: That's not what the testimony said.
9 So he talked about this with Dr. Schmidt right here, there
10 are these different applications that serve up different
11 pages. His team works primarily on the home page and some
12 of the browsing pages. The specifics of how one particular
13 page operates, he was not the most expert person on about
14 the he answered all their questions about it. No one ever
15 asked for more information, and he is not going to go into
16 anything now that he was not able to answer at his
17 deposition.

18 THE COURT: So that was another issue that was
19 raised. Is there anything he is going to say about
20 purportedly how the accused technology works that has not
21 been disclosed prior to trial?

22 MR. HADDEN: No.

23 THE COURT: And anything that was not disclosed
24 by the time of expert discovery?

25 MR. HADDEN: No. They had all the discovery

1 they wanted. Dr. Schmidt testified he revealed all of the
2 source code. They deposed Mr. Dunham and two other
3 technical witnesses. They asked them all the questions they
4 wanted. There was never an issue about them not getting the
5 information they needed.

6 THE COURT: It seemed to me that there was more
7 than one page that listed the claim language and the Court's
8 construction.

9 MR. HADDEN: To the extent there were are pages
10 of claim language, there are just the slides from
11 Dr. Schmidt's presentation.

12 THE COURT: Well, this witness isn't offered as
13 the rebuttal expert --

14 MR. HADDEN: He is not going to -- I'm sorry. I
15 don't mean to interrupt.

16 THE COURT: Let me ask you this. I'm definitely
17 very uncomfortable with a fact witness or purported fact
18 witness in any way discussing how the accused technology
19 maps to the asserted claims.

20 MR. HADDEN: I understand.

21 THE COURT: Do you have any objection to
22 revising these slides to delete all references to the claim
23 language?

24 MR. HADDEN: That's fine. I want to keep the
25 overall look of the slides so the jury will understand how

1 it relates to the testimony of Dr. Schmidt because
2 Dr. Schmidt put up this diagram and says it does X. So I
3 would like to be able to put up the same diagram but I'm not
4 never going to refer to the claim language at the top. If
5 you would like us to wipe that out, we can do that and I'm
6 happy to do that.

7 THE COURT: What about the source code? What
8 are you proposing to do with the source code?

9 MR. HADDEN: The only issue on the source code
10 was, there is one slide. There is one slide that shows one
11 of these mustache templates and he is going to put that up
12 to show what it looks like. We're not going to do anything
13 with the source code.

14 They complain because there was not, I don't
15 know, an exhibit attached to that picture. So we said,
16 okay, it's the source code laptop. We're not doing anything
17 with it. We were going to put up one slide with a picture
18 on it.

19 THE COURT: So you want to move the source code
20 in through them, but you're not proposing --

21 MR. HADDEN: They already moved it in.

22 THE COURT: But you're not proposing --

23 MR. HADDEN: I'm not going to talk about it.

24 THE COURT: What about hypothetical and what
25 would happen if we deleted the div?

1 MR. HADDEN: He's going to say that because he's
2 going to explain what the div actually does, so there is a
3 purpose for the div, but it's not the --

4 THE COURT: Help me understand the line between
5 fact and expert -- hold on. In this context if I'm going to
6 allow a fact witness to talk about what would happen if we
7 started removing certain lines of code, presumably, correct
8 me if I'm wrong, he's not going to testify that he ever did
9 as a factual matter remove those lines of code and see what
10 happened; correct?

11 MR. HADDEN: Yes.

12 THE COURT: That's correct?

13 MR. HADDEN: He will say he removed those lines
14 of code.

15 THE COURT: And he's disclosed that before?

16 MR. HADDEN: No.

17 THE COURT: How is that consistent with the
18 representation you made that whatever fact testimony he's
19 going to offer has already been disclosed?

20 MR. HADDEN: Well, he's going to -- they deposed
21 him, he answered all their questions, they didn't ask him
22 about div tag, they could have and he would have explained
23 what they did. Their expert latched on to this div tag. He
24 made a theory it does this certain thing. It doesn't do
25 that certain thing. Mr. Dunham is going to explain what it

1 actually does and that's a fact issue.

2 THE COURT: You have an expert who presumably
3 did whatever test he or she need to do, looked at the source
4 code and disclosed consistent with their obligations under
5 the rule what analysis he or she did and what opinions he or
6 she is going to express. Isn't that all correct?

7 MR. HADDEN: That's all correct, but Mr. Dunham
8 is the expert on how this system works. He can explain what
9 these stages do and why the code is in there to do what it
10 does. It is a fact issue. Dr. Schmidt said it does X and
11 it's here for a particular reason. Now it's for the jury to
12 decide which is right. And Mr. Dunham can explain the fact
13 issue of how the system actually works. One feature of that
14 is why they have div tags in there at all and he can explain
15 that.

16 THE COURT: But further testifying and as a test
17 I deleted the div tags or the language relating to it and
18 here is what happened, how is that not expert testimony or
19 something at least that needed to be disclosed?

20 MR. HADDEN: Because all he's doing is giving
21 the context of what the div tag actually does. It's their
22 burden to show that the div tag does what they said it does.
23 Our guy can come in and say they said it does X. No, it
24 doesn't, here is what it does. Here is why we put it in the
25 page, that's a fact issue.

1 THE COURT: Anything else?

2 MR. HADDEN: No, Your Honor.

3 MR. OUSSAYEF: Your Honor, opposing counsel just
4 literally said Mr. Dunham is the expert on how the system
5 works. That is an admission that he's coming in here to
6 testify as an expert witness, not a fact witness. That's
7 after he said clear as day, he's talking about Moustache
8 templates here:

9 "Question: So the page we're looking at here,
10 the deals, the deals page that comprise several Moustache
11 templates, right?

12 "Answer: It may.

13 "Question: Do you know one way or another?

14 "Answer: I don't know the details of the deals
15 page."

16 After telling us I don't know how Moustache
17 templates works, now opposing counsel just said he is the
18 expert on the system, but he is an undisclosed expert. We
19 don't know what experiments he ran and we have no fair
20 chance to respond.

21 This is directly on point of the case of EdgeCo
22 v FastCap. It says, "A party will not be permitted to evade
23 the strictures of Federal Rule of Civil Procedure Rule 26,
24 essentially presenting a surprise expert witness cloaked as
25 a lay witness."

1 And it says the reason for it at the bottom of
2 this quote shown on the Elmo is to ensure that each party is
3 given sufficient notice of an anticipated expert witness.

4 There is no way we could have known that
5 Mr. Dunham was going to say I deleted part of the code. He
6 could have said I'm going to delete any part of the code, he
7 could have said I'm going to modify it, he could have said
8 any number of things and we have no way of anticipating what
9 he could have said. If he were an expert, he could have
10 disclosed it in an expert report. Dr. Schmidt could have
11 analyzed it, looked back and said I don't agree. But
12 because he's a fact witness at trial disclosed the night
13 before with slides that show experiments that we have never
14 seen before, never been produced, never identified, we will
15 have zero chance to understand what he's going to say and
16 how he's go to say it.

17 THE COURT: I will give you another chance. At
18 this point from what I have heard, Mr. Oussayef, what are
19 you specifically asking me to do?

20 MR. OUSSAYEF: The whole presentation should be
21 stricken and we should look at -- they should prepare a new
22 presentation so we have a fair chance to evaluate what
23 they're actually going to present. Anything that has claim
24 language or experiments, the whole slide deck is about here
25 is what Dr. Schmidt said, I'm responding to his analysis of

1 the claims, or here is how div tags work. I didn't
2 experiment with div tags.

3 Our fact witness was not permitted to say the
4 word div. Our fact witness was not permitted to talk about
5 anything after the date of his invention which is -- which
6 he might have known about, those are facts, because it was
7 expert testimony. This goes well beyond that area that was
8 already excluded.

9 THE COURT: Okay. Mr. Hadden.

10 MR. HADDEN: Mr. Dunham is here to explain how
11 the Groupon system works. The one question that he pointed
12 to said how many testimony plates are on this page. He said
13 I'm not sure. He goes on and talked about how Mustache
14 templates work. They put up his testimony about Moustache
15 templates with Dr. Schmidt. They put up Mr. Dunham's
16 testimony in the slides with Dr. Schmidt throughout
17 purportedly relying on his testimony as to how the Groupon
18 system works.

19 Now, how our system works is a fact issue. It
20 is undisputedly a fact issue. Whether it meets the claims
21 is an expert issue.

22 THE COURT: How it works compared to what their
23 expert said, how it works compared to claims seems to me
24 like they're opinion issues.

25 MR. HADDEN: I disagree on the first part. All

1 he's going to say is how it works. This is how it works.
2 What their expert says about how our system works is not
3 opinion, it's fact. Right? If Dr. Schmidt gets up and said
4 this message goes from here to there, that's a fact. And if
5 he's wrong, Mr. Dunham can get up and say no, the message
6 goes from here to there.

7 Now we have a fact dispute for the jury. That's
8 what Mr. Dunham is going to do. That's what trials are for.
9 That's not opinion. Opinion is that going from here to
10 there meets the claim. He's not going to say that. All
11 he's going to say, it goes from here to there, Schmidt said
12 it goes from here to there, Schmidt is wrong. That is
13 perfectly appropriate. That's why we have people come in
14 and talk about how systems work at trial. He's not going to
15 talk about the claims, he's not going to give an opinion.

16 It was IBM's burden to come up with theory that
17 is factually correct. They failed to do that. They said
18 here, here is code that does Y. They are wrong. Mr. Dunham
19 is going to come in and say no, that code does X. That's a
20 fact dispute for the jury. That's completely appropriate.
21 That's what trials are for.

22 I just don't see the issue. He's not going to
23 give opinions, he's going to say exactly how Groupon works,
24 why do we put this code here, what does it do?

25 THE COURT: That would all be fine if that's

1 what you walked in here to do. That's not what you walked
2 in here to do. You prepared a slide deck, I guess disclosed
3 last night, I assume consistent with the timing that
4 purports to have him map claim language on to --

5 MR. HADDEN: No.

6 THE COURT: This is the exhibits that you
7 disclosed that you have shown to me. You have described him
8 as the expert. You have talked about experiments that have
9 not been disclosed until last night or this morning. So you
10 know, it might be fine and good if you walked in here to
11 have him just give fact testimony about how the accused
12 product works, but that doesn't look like what you were
13 planning to do.

14 MR. HADDEN: The only reason there is claim
15 language on the slide is because I'm using Dr. Schmidt's
16 slide where he has documents from Groupon purporting to
17 explain how they work. And Mr. Dunham is going to look at
18 those documents and say Dr. Schmidt said it does this, does
19 it do that? No, it doesn't do that. There is going to be
20 no reference to the claim language.

21 THE COURT: Anything else?

22 MR. HADDEN: No.

23 THE COURT: Any response?

24 MR. OUSSAYEF: Just briefly, Your Honor, on the
25 experiments. Because the experiments were not disclosed, we

1 don't even know what the result of the experiments will be.
2 We don't know what kind of -- whether X happened or whether
3 Y happened. We don't know how they were run. We don't know
4 when they were run. We don't know on what version of the
5 system it was run. We don't know whether they apply to this
6 div tag or some other div tag. We have honestly no idea
7 what the tests are supposedly going to show.

8 THE COURT: All right. Do you have other issues
9 you're raising this morning? I'm not ready to hear it yet,
10 I just need to figure it out.

11 MR. DESMARAIS: Just one brief one.

12 MR. OUSSAYEF: Just one brief one.

13 THE COURT: And you have some more depositions
14 you're playing?

15 MR. OUSSAYEF: Yes, Your Honor.

16 THE COURT: Then what's happening the rest of
17 this morning?

18 MR. DESMARAIS: We're not starting with that.

19 MR. OUSSAYEF: We're starting with reading
20 discovery responses, then we'll call our next witness,
21 Mr. McBride.

22 THE COURT: Okay. And then depositions or maybe
23 not?

24 MR. OUSSAYEF: Then we'll call our next witness
25 which will be Dr. Hausman and then we'll play deposition

1 testimony.

2 THE COURT: And you expect to rest today, then?

3 MR. OUSSAYEF: Yes, Your Honor.

4 THE COURT: And then is Mr. Dunham your first
5 witness?

6 MR. HADDEN: No, the second witness.

7 THE COURT: Second witness. So we're not going
8 to get to him at least for a few hours; is that right?

9 MR. HADDEN: Correct, Your Honor.

10 THE COURT: All right. We will come back to
11 this. And Groupon is going to have some issues this
12 morning, also; is that right?

13 MS. SHAMILOV: Yes.

14 THE COURT: Let's move on. I will come back to
15 this, I promise. Let's hear IBM's next issue.

16 Good morning.

17 MS. STEMLER: Good morning, Your Honor. Laurie
18 Stempler of IBM. Hopefully this is just a mechanical issue.
19 I don't think there is an objection to these slides, I want
20 to make the direct goes smoothly with respect to
21 Professor Hausman. There are some exhibits that have been
22 unwieldy because they are multiple copies of the expert
23 reports that he relied on like spreadsheets, some of the
24 slides will look like this and have PX numbers, I'll be
25 showing them to him during the presentation. I just want to

1 make sure that that is not going to draw an objection and
2 say that he has to view things on a laptop or binders full
3 of documents. That's really just the issue.

4 THE COURT: Good morning.

5 MS. SHAMILOV: Good morning, Your Honor. We
6 have no issue with that.

7 THE COURT: No issue.

8 What is Groupon's issue or issues this morning?
9 Good morning.

10 MS. MEHTA: Good morning, Your Honor. Sapna
11 Mehta for Groupon. Groupon objects to a series of exhibits,
12 proposed exhibits that IBM has proposed with respect to
13 Professor Hausman's testimony. And these are Plaintiff's
14 Exhibits 549 to 557. They are the Stewart survey report and
15 appendices. And our objection is that this was an expert
16 discovery disclosure from another case not involving Groupon
17 and it's inadmissible hearsay.

18 THE COURT: Okay.

19 MS. STEMLER: Your Honor, this is a report,
20 it's really a survey that Dr. Hausman relied on in his
21 expert report and we produced it as a document in the case
22 and he cited it in his opening report. We're not offering
23 it as his expert testimony or opinion, it's more like any
24 other survey that he would have relied on for forming his
25 opinion.

1 So they have known that he was relying on this
2 for part of his opinion since October when he cited it in
3 his opening report, and, you know, they could have sought to
4 serve a subpoena to depose Dr. Stewart, but again, it's just
5 like any other survey that has been used to inform Professor
6 Hausman's opinions.

7 THE COURT: I'm told it was from another case.
8 Was it your other case?

9 MS. STEPLER: Correct. It was an expert report
10 in the Priceline matter.

11 THE COURT: But it was disclosed to the
12 defendants you say in a timely manner in this case?

13 MS. STEPLER: It was produced in August with a
14 Bates stamp and cited in Professor Hausman's report in
15 October of 2017.

16 THE COURT: His report in this case?

17 MS. STEPLER: Correct.

18 THE COURT: What about the hearsay objection?

19 MS. STEPLER: Because he relied on it in
20 formulating his opinion, it falls within the exception.

21 THE COURT: Does that necessarily mean that it
22 gets into evidence or just that he can talk about his
23 reliance on it?

24 MS. STEPLER: I think it would be permissible
25 to admit it into evidence, however, if it would resolve the

1 issue to have him look at the exhibit in the binder and talk
2 about what it says, you know, we could do it that way, too.

3 THE COURT: Okay. Thank you.

4 Ms. Mehta, come back. Would that resolve the
5 issue?

6 MS. MEHTA: Yes, Your Honor.

7 THE COURT: Okay. So then I think we have an
8 agreement that he can talk about 549 and 557 I think it was,
9 but you won't offer them into evidence; correct?

10 MS. MEHTA: To the extent he disclosed them in
11 his expert report.

12 THE COURT: Right. He still can't express an
13 opinion that he hasn't properly disclosed previously, but in
14 terms of the Stewart exhibit itself, he can talk about it
15 subject to the prior disclosures, but it's not going to be
16 offered into evidence.

17 MS. MEHTA: Correct.

18 THE COURT: You're okay with that?

19 MS. MEHTA: Yes.

20 MS. STEPLER: Yes, Your Honor.

21 THE COURT: Any other issues from Groupon?

22 MS. SHAMILOV: No, Your Honor.

23 THE COURT: We'll take a short recess.

24 (Brief recess taken.)

25 * * *

1 (Proceedings reconvened after recess.)

2 THE COURT: Have a seat.

3 The jury is all here. I do want to give you a
4 ruling on the Dunham issue before we bring them in.

5 It's IBM's objection to the demonstrative slide.
6 I am in large part sustaining the objection and these slides
7 are going to have to be redone substantially in light of my
8 ruling.

9 Specifically, I will allow Mr. Dunham to explain
10 how the accused product, the Groupon product works, but I'm
11 not going to allow him to testify to any experiments he has
12 done to any hypotheticals of how the Groupon product would
13 work if certain experiments were done or certain
14 modifications to the code were made. He is not going to be
15 answering hypothetical questions or offering speculation or
16 opinion as to modifications that could be. He is not going
17 to be permitted to compare the claims or the claim language
18 or the Court's claim construction on the accused device.
19 And he is not going to be talking about Dr. Schmidt.

20 He is not here as a rebuttal expert. He is
21 not here to point out flaws even in the supposed factual
22 portions of the other side's expert's testimony. He is here
23 as I understand it to talk about as a factual matter his
24 knowledge from his own personal experience of what the
25 accused product is and how it works.

1 My ruling is based on the distinction between
2 fact and expert testimony. Expert testimony has certain
3 additional disclosure obligations that need to be met and
4 which were not met here because, of course, the witness Mr.
5 Dunham is not being offered as an expert. But that means
6 that there are certain things he can't do that an expert who
7 was properly and timely disclosed and disclosed his opinions
8 could do.

9 I also am concerned because it appears from
10 slides that what Groupon intended to do with Mr. Dunham
11 would stray I think significantly across the fact expert
12 line and would unfairly prejudice the plaintiff and
13 therefore I do think it is important that I set very strict
14 lines as to what the Dunham testimony is going to be. So
15 all of that has led to my ruling here.

16 Any questions about that?

17 MR. OUSSAYEF: No, Your Honor.

18 THE COURT: Any questions?

19 MR. HADDEN: No, Your Honor.

20 THE COURT: All right. So you are going to have
21 to work out the timing for revised slides, and the plaintiff
22 is going to have an opportunity to review them so that any
23 additional objections can be raised before Mr. Dunham takes
24 the stand.

25 All right. Understood?

1 MR. HADDEN: Yes, Your Honor.

2 MR. OUSSAYEF: Yes, Your Honor.

3 THE COURT: All right. Let's bring the jury in.

4 Oh, right. A couple of just housekeeping
5 matters.

6 When the jury comes in, we're going to give them
7 the additional witness photos that I guess we were just
8 given yesterday. I think they're the deposition witnesses.
9 And I have a lunch meeting today at 12:00 to around 12:45 so
10 we'll take a slightly longer lunch break today.

11 Okay. You can go get the jury.

12 (Jury returned.)

13 THE COURT: Good morning, members of the jury.
14 Nice to see you all again.

15 A few preliminaries from me before we get
16 started.

17 First, you may notice the temperature has been
18 rather cold in here ever since we complained the other day
19 about it being too hot. I'm hoping this is more comfortable
20 than when it was too hot, and I hope over the course of the
21 day we'll find that it gets to an acceptable temperature.

22 Today, I have a commitment during lunch so we're
23 going to take lunch a little bit early, so we'll break
24 around 12:00 and the lunch break may go to 12:45 or 1:00.
25 I'll be back just as soon as I can be.

1 And we have some more pictures for you. Some of
2 the additional witnesses that we hadn't given you photos of
3 before, Mr. Looby will now give you your copy of the photos
4 of those witnesses.

5 (Documents passed out to jurors.)

6 THE COURT: And with that, we'll turn to IBM for
7 whatever is next. Good morning, Mr. Desmarais.

8 MR. DESMARAIS: Thank you, Your Honor. We'll
9 now like to read some discovery responses. And my colleague
10 Mr. Oussayef will do the reading.

11 THE COURT: That's fine.

12 Good morning.

13 MR. OUSSAYEF: Good morning, Your Honor.

14 Ladies and gentlemen of the jury, I will now
15 read from some discovery responses.

16 The first one is shown here.

17 This is defendant Groupon's supplemental
18 responses to certain IBM interrogatories. And what that
19 means is that IBM has the opportunity to ask questions of
20 Groupon, and Groupon has the obligation to answer those
21 questions truthfully.

22 And this first interrogatory, IBM asked about
23 Groupon's awareness of the patents in this lawsuit.

24 THE COURT: Is there an issue.

25 MS. SHAMILOV: He should be just reading. It is

1 characterizing. If he is just reading, that's fine.

2 THE COURT: I think he is just giving some
3 nonargument background. Go ahead.

4 MR. OUSSAYEF: Groupon responded to the
5 interrogatory asking about awareness of the patents by
6 saying: Groupon first became aware of U.S. Patent Nos.
7 5,769,967 and 7,072,849 via communications with IBM on
8 November 1st, 2012. Groupon first became aware of U.S.
9 patent No. 5,961,601 via communications with IBM on April
10 13th, 2012. Groupon first became aware of U.S. Patent No.
11 7,631,346 via communications with IBM on August 11th, 2014.

12 Next, we have another set of interrogatories.
13 An question was asked about how Groupon's single-sign-on
14 functionality worked. And here is an excerpt from the
15 response:

16 If the user's service receives an ID token, it
17 will contact a Google API endpoint if the ID token does not
18 also contain the user's e-mail.

19 MS. SHAMILOV: Your Honor, may I have a sidebar
20 on this issue?

21 THE COURT: All right. Bear with us, ladies and
22 gentlemen.

23 (Sidebar conference held.)

24 THE COURT: Okay. What is the issue?

25 MS. SHAMILOV: The interrogatory's full answer

1 is almost a page, and they're picking one sentence out of
2 it.

3 THE COURT: Have you not all conferred -- hold
4 on -- on what you were going to do here?

5 MR. OUSSAYEF: Yes. We fully disclosed all of
6 this interrogatory response.

7 THE COURT: How about the highlighted portion.

8 MS. SHAMILOV: No.

9 THE COURT: I mean did you indicate to them you
10 were going to read the highlighted portion?

11 MS. SHAMILOV: No.

12 MR. OUSSAYEF: No, Your Honor. We did not, but
13 ...

14 THE COURT: What did you disclose? That you
15 were going to read the whole thing.

16 MR. OUSSAYEF: Just that we would disclose the
17 discovery responses themselves and read them.

18 MS. SHAMILOV: They were redacted so they
19 removed the interrogatories portion they didn't need and not
20 the whole thing.

21 THE COURT: Are you going to have to read the
22 whole thing?

23 MR. DESMARAIS: We sent them redacted. This is
24 with an exhibit number on it.

25 THE COURT: But are you reading everything that

1 you sent them?

2 MS. SHAMILOV: No.

3 MR. DESMARAIS: Well, we can.

4 THE COURT: You have to.

5 MR. DESMARAIS: The whole paragraph is not
6 relevant.

7 THE COURT: You will have to read the whole
8 thing.

9 MS. SHAMILOV: Yes, I want the whole thing.

10 THE COURT: Read the whole question and whole
11 answer consistent with what you disclosed to them.

12 MS. SHAMILOV: Thank you.

13 (Sidebar conference ends.)

14 MR. OUSSAYEF: Ladies and gentlemen of the jury,
15 I will now read the interrogatory question and interrogatory
16 response.

17 Interrogatory No. 18. Describe in detail the
18 sign-in use case in which an end-user's Facebook or Google
19 credentials are used to create a new Groupon user account
20 for the end-user at an accused instrumentality. Your
21 response should identify all variables, attributes,
22 authentication tokens, and/or other information used to sign
23 in or create the new end-user account and should identify
24 any and all documents and source code files describing,
25 depicting, or relating to such use case.

1 Subject to and without waiving any objections,
2 Groupon responds as follows:

3 For login via Facebook where a user does not
4 have a pre-existing account at Groupon, the login process
5 begins when a user clicks on Facebook login button on a
6 login or signup screen in the frontend client, Android, iOS,
7 or Groupon web page. The frontend client uses the Facebook
8 SDK for a login handshake with Facebook. The SDK handles
9 the user interaction with Facebook, including presenting the
10 user with a Facebook hosted screen or web page. If the user
11 is not already logged into Facebook, they are prompted to
12 login. If the user has not previously logged into Groupon
13 via Facebook, they are prompted to grant permission to the
14 Groupon application to access some of their Facebook public
15 profile data. The Groupon client receives a Facebook access
16 token back from the SDK. The Groupon frontend client calls
17 the Groupon backend, the Groupon API/GAPI, via a post to
18 /api/v2/oauth/facebook_authenticate with the Facebook access
19 token which in turn passes the token to the user's service
20 via a post to /users/V1/accounts/facebook_authentication.
21 The user's service calls the Facebook API using the Facebook
22 access token and gets back data from Facebook, including the
23 Facebook user ID, e-mail address and name. If there is no
24 existing Groupon user account with the same e-mail address
25 as the Facebook account, a new Groupon account is created

1 with the received name and e-mail address and is linked to
2 the Facebook user ID. The user is logged into that new
3 account.

4 For login via Google where a user does not have
5 a preexisting account at Groupon, the login process begins
6 when a user clicks on a Google login button on a login or
7 signup screen in the frontend client: Android, iOS, or
8 Groupon welcome page. The frontend client uses the Google
9 SDK for a login handshake with Google. The SDK handles the
10 user interaction with Google, including presenting the user
11 with a Google hosted screen or web page. If the user is
12 not already logged into Google, they are prompted to log in.
13 The Groupon client receives either a Google ID token or a
14 Google one-time authorization code back from the SDK. The
15 website always uses the one-time authorization codes. On
16 Android, the Groupon application may receive an ID token
17 without the SDK contacting a Google server. The Groupon
18 frontend client calls the Groupon backend, the Groupon
19 API/GAPI via post to api/v2/oauth/google_authenticate with
20 the Google ID token or a one time authorization code as
21 appropriate, and the GAPI in turn passes the token or code
22 to the user's service via a post to
23 /users/v1/accounts/google_authentication.

24 If the user service receives a one-time
25 authorization code, it will contact a Groupon API endpoint

1 to exchange the code for an ID token which will indicate a
2 Groupon ID for the user, the user's email address and the
3 user's name. If the user's service receives an ID token,
4 it will contact a Google API endpoint if the ID token does
5 not also contain the user's email. If there is no existing
6 Groupon user account with the same email address as the
7 Google account, a new Groupon account is created with the
8 received name and email address and is linked to the Google
9 user ID. The user is logged into that new account.
10 Pursuant to Rule 33(d) information relevant to this response
11 may be ascertained from the source code Groupon has made
12 available in this case.

13 Investigation and discovery are ongoing and
14 Groupon reserves the right to supplement, amend, or modify
15 its responses to this interrogatory as additional facts are
16 learned and as otherwise appropriate."

17 Next, we'll read from a discovery response which
18 is called a request for admission. This is where IBM can
19 ask Groupon to admit certain facts and Groupon has to
20 truthfully respond to those requests.

21 "Request for Admission Number 7:

22 "Admit that Groupon does not have any policy for
23 licensing patents.

24 "Response: Subject to and without waiving the
25 foregoing objections, Groupon responds as follows:

1 "Groupon admits that it has no patent licensing
2 policies."

3 Next there is one more interrogatory response.
4 The Interrogatory Number 22 reads: "Identify all
5 information, including but not limited to information about
6 a particular user, session, deal, or transaction, that you
7 track using cookies or using variables in a URL, and for all
8 information identified, state whether you track that
9 information using cookies and whether you track that
10 information using variables in a URL."

11 "Subject to and without waiving any objections,
12 Groupon responds as follows:

13 "In general, Groupon uses information in URLs,
14 including query string parameters to identify resources
15 requested by a user. Groupon uses information in cookies to
16 track users and sessions as well as to store information
17 about users and their habits. Detailed information
18 regarding the information tracked in cookies is found in the
19 source code made available by Groupon. Investigation and
20 discovery are ongoing, and Groupon reserves the right to
21 supplement, amend or modify its response to this
22 interrogatory as additional facts are learned and as
23 otherwise appropriate."

24 "Interrogatory number 25.

25 "Identify all factors that led to your decision

1 to require a user have a Groupon account before being able
2 to access My Stuff, Visitor Referral, Wish List, and any
3 other resource that can only be accessed by users with
4 Groupon accounts."

5 "Response.

6 "Subject and without waiving any objection,
7 Groupon responds as follows:

8 "Groupon requires user log in to certain pages
9 because, for those pages, Groupon needs to be able to know
10 about the user in order to provide the requested service to
11 the user. Investigation and discovery are ongoing, and
12 Groupon reserves the right to supplement, amend, or modify
13 its response to this interrogatory as additional facts are
14 learned and as otherwise appropriate."

15 And that concludes the reading at this time,
16 Your Honor.

17 THE COURT: Okay. Thank you.

18 MR. DESMARAIS: Thank you, Your Honor. Those
19 discovery requests are labeled with exhibit numbers,
20 Plaintiff's 502, Plaintiff's 497, Plaintiff's 501, and
21 Plaintiff's 504. And we would offer them now in redacted
22 form.

23 MR. HADDEN: No objection, Your Honor.

24 THE COURT: Those are all admitted.

25 (The above exhibits were admitted.)

McBride - direct

1 MR. DESMARAIS: Thank you, Your Honor. IBM's
2 next witness will be Tom McBride. He is an IBM licensing
3 executive and he'll testify about IBM's licensing policies
4 and IBM's licenses. And his testimony goes to damages and
5 reasonable royalty.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. DESMARAIS: And my colleague, Brian Matty,
9 will do the examination.

10 THE COURT: Okay.

11 ... THOMAS McBRIDE, having been first duly sworn,
12 was examined and testified as follows ...

13 THE COURT: Good morning, Mr. McBride, and
14 welcome.

15 THE WITNESS: Thank you.

16 THE COURT: You may have a seat.

17 And Mr. Matty, you may proceed when you're
18 ready.

19 MR. MATTY: Thank you, Your Honor

20 DIRECT EXAMINATION

21 BY MR. MATTY:

22 Q. Good morning, Mr. McBride.

23 A. Good morning, Brian.

24 Q. Would you please tell the jury where you work?

25 A. I work for IBM.

McBride - direct

1 Q. And where do you live?

2 A. I live in Montgomery, Texas which is just north of
3 Houston.

4 Q. Do you have a family back in Texas?

5 A. Yes, I do. My wife, Sharon, two golden retrievers.
6 We raised five children. They're all grown now and they
7 have children of their own. And we all live in Texas.

8 Q. And how long have you lived in Texas?

9 A. We moved to Texas in 1983, so going on thirty-five
10 years.

11 Q. And how long have you worked at IBM?

12 A. IBM considers me an employee since 1991, so that
13 would be twenty-five years.

14 Q. And what group do you work in at IBM?

15 A. I'm in what's called the Technology and Intellectual
16 Property Group which is a corporate function aligned with
17 IBM Research.

18 Q. And when did you join that group?

19 A. I joined that group in 2007.

20 Q. What is your position in the Technology and
21 Intellectual Property Group?

22 A. I'm called the licensing executive.

23 Q. Before we get into IBM's patent licensing I would
24 like to talk about your background. Did you attend college?

25 A. I did, Southeast Missouri State University. I

McBride - direct

1 received a degree, a bachelor of science degree in
2 mathematics.

3 Q. What did you do after college?

4 A. One of my first jobs was with the Saturn V program,
5 the NASA Saturn V program in Huntsville, Alabama.

6 Q. Could you explain what the Saturn V program was for
7 the jury?

8 A. Yes. The Saturn V program was the Werner Von Braun
9 project to build a rocket to put a man on the moon. My job
10 was as a computer programmer to build trajectory models for
11 the Saturn V.

12 Q. How did you go from rocket science to working at IBM?

13 A. Well, I joined a small software company called
14 Rationale Software in 1991. Rationale had a software
15 development environment for ADA. And the ADA programming
16 language was being used by the NASA space station program
17 which was based in Houston. I was living in Houston at the
18 time. Rationale was a small startup company at that time
19 that ultimately was acquired by IBM in 2003. That's how I
20 became to join IBM.

21 Q. Now, do you have any professional certifications?

22 A. Yes. Through the Licensing Executives Society I'm
23 what's called a certified license professional.

24 Q. What does that mean to be a certified licensing
25 professional?

McBride - direct

1 A. Well, in order to qualify, it's sort of like a CPA
2 for accounting. In order to qualify you need first of all,
3 seven years of experience. Secondly, you have to pass a
4 certification test. And third, you have to make a
5 commitment to continuing education taking course work, and
6 there is a minimum requirement of hours per year.

7 Q. And how long have you been a certified licensing
8 professional?

9 A. Four going on five years.

10 Q. All right. I would like to talk a little bit about
11 IBM. How much does IBM spend annually on its research and
12 development for its products?

13 A. Last year it was 5.6 billion. In previous years it's
14 roughly that same amount. Maybe six, seven percent of total
15 income.

16 Q. And why does IBM spend so much on its research?

17 A. Well, it really is driven by IBM's core values. And
18 there is three of them. This one is, the first core value
19 is innovation that matters. Innovation that matters to IBM,
20 and innovation that matters to the world.

21 The investment of five to \$6 billion a year is
22 intended to drive innovation. And in the high tech
23 business, if you're not innovating, complacency is death.
24 You really do have to re-invent yourself. And IBM has been
25 around over a hundred years, but only because of its

McBride - direct

1 commitment to innovation and its ability to re-invent
2 itself, to adapt to the changing technology world.

3 Q. How does IBM's patent portfolio fit into to its
4 commitment to innovation?

5 A. Out of innovation comes patents, lots of patents.
6 There were over 8,000 U.S. patents last year. That doesn't
7 count foreign patents that may be associated. For the last
8 twenty-five years, IBM has led the world in the production
9 of U.S. patents. And IBM views patents as strategic assets.

10 Q. Now, how does IBM's licensing of its patents fit into
11 those views?

12 A. So, when you think of patents, you may think that
13 patents are intended to protect markets, to create
14 monopolies. IBM doesn't view it that way. We view patents
15 as strategic assets to be used for the good of the industry.
16 So we share patents and we share patents in multiple ways
17 with others within the information technology industry.

18 The first way is that we pledge patents to
19 standards organizations. Standards that are important not
20 only to IBM, but also to the industry. We pledge patents to
21 open source. Here again, open source that's important to
22 IBM, but also to the industry.

23 One such example is the open innovation network
24 which has a portfolio of patents to protect the Lennox
25 operating system. The Lennox operating system is important

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1 to IBM but it's also important to the industry.

2 And, in fact, the Lennox operating system is the
3 foundation for much of the cloud platforms that are
4 available today.

5 The third thing is we share patents through
6 assignment. We assign a lot of patents to a lot of
7 companies that may be looking to help build their own patent
8 portfolios, and having patents in the high tech world is an
9 important asset, strategic asset for those companies.

10 Q. What are the benefits back to IBM of licensing those
11 patents?

12 A. The fourth way of sharing --

13 Q. I'm sorry, continue.

14 A. -- is through cross licensing. And that's what I do.
15 I do cross licensing as well as patent assignments.

16 Q. So then what are the benefits back to IBM of
17 licensing its patents?

18 A. There are two primary benefits to cross licensing a
19 patent, and also assigning patents. The first one is that
20 IBM receives income. Income is important as a way to offset
21 or help offset that R&D expense, which is considerable. If
22 we didn't have that income, there would be certain jobs lost
23 that -- certain jobs that would not exist without that
24 income in place. We certainly don't offset the entire
25 amount, but we offset a significant percentage of that, not

McBride - direct

1 only through patents, but also through other monetization of
2 intellectual property.

3 The second reason, and this is probably the most
4 important reason, is IBM receives freedom of action. That
5 is, we -- when we cross -- let me explain. When we cross
6 license, what that means is that we give rights to the other
7 party, the licensee, to all IBM patents and patent
8 applications that are related to their business. They in
9 turn give us the right to use all the patents and
10 applications that they own that are relevant to our
11 business. There is usually a fee associated with that which
12 is the income side of it.

13 But as a result of this cross, the sharing of
14 patents between ourselves, IBM now has freedom of action to
15 build product, to go to market with product without fear of
16 infringing the other party's patent. And if you do that
17 broadly enough across the industry, it gives you significant
18 freedom to build your business without infringing others,
19 other people's inventions.

20 Q. Now, how many patent licenses has IBM entered into?

21 A. I couldn't give you an exact number, but over the
22 past forty plus years that we have been doing this, it must
23 be in the thousands.

24 Q. Do any of those licenses cover the patents in this
25 case?

McBride - direct

1 A. Most of them do because of the nature of our cross
2 licenses, yes.

3 Q. So, could you briefly explain to the jury what the
4 Technology and Intellectual Property Group at IBM does to
5 support those licensing efforts?

6 A. So, the Technology and Intellectual Property Group as
7 I said was associated with IBM Research. As such, we manage
8 all of the intellectual property across all of IBM, which
9 would include patents, copyrights, trademarks. It would
10 include hardware technology, software technology. The group
11 also does joint development with other organizations, other
12 companies in the information technology world. We do joint
13 research with other companies in the technology world, and
14 we also divest businesses, and divesting businesses, divest
15 the intellectual property associated with those businesses.
16 So patents is simply one piece of our overall intellectual
17 property portfolio.

18 Q. And focusing on patent licensing, how does IBM decide
19 which companies to approach to discuss patent licensing?

20 A. Well, with a focus on freedom of action. Certainly
21 we're interested in working with and sharing patents with
22 companies like ourselves who are in the information
23 technology. Information technology is a very broad area.
24 It certainly includes sectors like web technology, but also
25 computer systems, software systems, networking, materials,

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1 semiconductors, what you might think of as older
2 technologies.

3 Then there are emerging new technologies like
4 block chain, cognitive computing, augmented intelligence,
5 natural language processing, these are emerging areas where
6 certainly -- certainly areas that IBM is patenting in, but
7 we know that many others are patenting in those same areas
8 so we're certainly interested in working with companies and
9 sharing patents in all of those areas.

10 Q. And how does IBM determine if its patent portfolio
11 might be valuable to another company?

12 A. So what we do is, and I personally am responsible for
13 the software sector and I also work in the web technology
14 sector, in each of those we try to identify the big players
15 that we want to work with. We try -- I work with patent
16 engineers and also patent attorneys and we try to understand
17 within each of those sectors who the big players are, what's
18 their revenue profile, what do their patents portfolio look
19 like, what technology areas are they in, and how does this
20 match up with IBM's patent portfolio and can we determine if
21 there is value from the IBM patent portfolio to the other
22 company. And if so, what value can we see coming back in
23 return in the form of their patent portfolio.

24 Q. And you mentioned the patent engineers. What is a
25 patent engineer?

McBride - direct

1 A. Well, a patent engineer would be like a person with a
2 technical background, an engineer, software developer, who
3 also has an understanding of the unique nature of patents
4 and how patents can be mapped to and the claims and elements
5 of the patent mapped to products and services from another
6 company.

7 Q. And I'd like to show you some demonstratives and
8 exhibits.

9 MR. MATTY: Your Honor, may I approach?

10 THE COURT: You may approach.

11 (Binders passed forward.)

12 BY MR. MATTY:

13 Q. All right. Mr. McBride, if you would please look at
14 Demonstrative PDX-5 in the binder in front of you?

15 A. Yes.

16 Q. And when you are there, will you let me know if these
17 demonstratives will aid in your testimony today?

18 A. Yes.

19 Q. All right. Let's talk about IBM's preferred
20 structure for its preferred licenses. I see the first point
21 you have on slide 1 is cross license. Could you remind the
22 jury what that means?

23 A. Well, that means that the agreement that we enter
24 into is a cross license. It's mutual such that we give
25 rights to the other party to use the IBM patents and

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1 applications that are relevant to their business. They, in
2 turn, give us the rights to use patents and applications
3 they own that are relevant to our business.

4 Q. And moving down to the second point, I see you have
5 there: products and patents defined by field of use term.

6 What does that mean?

7 A. Right. So when we share patents, it's impractical to
8 list the patents, the patent numbers. I mean IBM's patent
9 portfolio is upward of 45,000 patents and it changes every
10 day, so it's impractical. And so what we do is, in the
11 patent cross-license agreement, we define what we call the
12 licensee's field of use. It's really a definition of their
13 business. It describes their products and services. And
14 then we say in the agreement that we're granting the right
15 for them to use any and all IBM patents that are relevant to
16 that definition, that definition of their business. They,
17 in turn, do the same for us.

18 And IBM defines its business. We pretty much
19 have a standard definition that we have used for a number of
20 years. And any patents and applications they own, they
21 grant us the right to use those that are relevant to our
22 business.

23 Q. And on the third line, I see: fixed term or life of
24 patents term. Can you explain what that means?

25 A. Normally, the patent cross license agreement has a

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1 term. Usually it's five years. At the end of the five
2 years, it would be renewed, renegotiated. Or it could be
3 what we call a life of patent term, which means that the
4 other party has the right to use any and all IBM patents
5 and applications that have been filed on the date of the
6 agreement for the life of those patents.

7 Now, patents you may know have a life of
8 20 years. But the average life of the IBM portfolio at this
9 particular moment in time is 13.4 years. So you could say
10 that the term of the license is 13.4 years.

11 Q. And finally I see: balancing payment to IBM.

12 Could you explain what that means?

13 A. Yes. So there is usually a fee consideration. What
14 we do is we take into account the value of their portfolio
15 to us, the value of our portfolio to them. Our portfolio
16 being as large as it is, and robust, the balancing payment
17 tends to favor IBM. And it's also written into the
18 agreement.

19 Q. Generally, how does IBM determine the value of a
20 patent license that it offers?

21 A. Well, we have a standard valuation model, we called
22 it VOE, Vendor Objective Evidence. We've used it for years.
23 I have been in the group for 11 years and certainly we used
24 it during that time and even prior to that time. It's a
25 spreadsheet. And we input certain parameters and produce

McBride - direct

1 calculations.

2 It's really helpful because, No. 1, it allows us
3 to establish a benchmark across all licensees based upon the
4 parameters that are input into the model.

5 And, secondly, it gives us the basis to make an
6 initial offer. The natural question any time you approach
7 somebody about a patent cross license is, well, how much
8 does it cost?

9 So we typically do that work up front. It
10 becomes the basis for an initial offer. That offer must
11 be approved by our Vice President of the Patent Group.

12 Q. So when you start with that model and when you use
13 that model, where do you start?

14 A. Well, we start with two things:

15 First of all, the other party's revenue over the
16 next five years. Relevant revenue. In other words, revenue
17 that is relevant to the IBM patent portfolio.

18 Secondly, we set a royalty rate. And then
19 ultimately the price that is established is the royalty rate
20 times the revenue over five years, and that's the balancing
21 payment.

22 Now, there are adjustments that we make to the
23 royalty rate, which we will, we can get into.

24 Q. So let's talk about those. What do you mean by an
25 adjustment?

McBride - direct

1 A. Well, first off, we establish a gross royalty rate,
2 and then we make adjustments to it based on various
3 considerations.

4 The royalty rate, gross royalty rate that we
5 start with varies depending upon the situation.

6 If we're working with somebody where there is no
7 knowledge of infringement or even any suspicions of
8 infringement, then we set a royalty rate of .25. And from
9 that, we make adjustments.

10 In the event there is a suspicion of
11 infringement, then we may start with a higher royalty rate
12 like .5.

13 If there is proof of, knowledge of to IBM of
14 infringement, we start with a rate that could be anywhere
15 between 1 and 5 percent. Usually it's 1 percent. And then
16 we make adjustments accordingly.

17 Q. All right. So what are some of the discounts that
18 IBM makes after determining the royalty value or the royalty
19 rate?

20 A. So the first adjustment that we make would be, in our
21 judgment, the value of the other party's patent portfolio to
22 IBM. This results in us discounting the royalty rate
23 because we clearly want to get that value in return and we
24 want to fairly compensate the other party for the value of
25 their portfolio.

McBride - direct

1 We respect others, the intellectual property of
2 others. We certainly do not want to infringe. Our goal is
3 freedom of action. And so we set a value on their patent
4 portfolio as an adjustment and a reduction in the royalty
5 rate.

6 Q. And what would that discount be if there was no cross
7 license back to IBM, to the other company's patent?

8 A. Well, there would about no adjustment. It would be,
9 a factor that you would put in the model would be zero.

10 Q. What are some of the other discounts that IBM applies
11 in its model?

12 A. Well, a few minor ones. No. 1 would be rather than
13 having a running royalty over a period of time which is
14 difficult to administer, we typically look for one upfront
15 payment for the license which simply makes it easy and
16 convenient. And for that, we give an additional discount or
17 make an adjustment.

18 Q. And are there any other discounts?

19 A. Well, you know, the other thing which is very
20 important is when we look at a licensee, their revenue may
21 be in the U.S. but they may have revenue outside the United
22 States.

23 Q. Now, to what extent does IBM have patents outside of
24 the United States which are relevant to that revenue?

25 A. Maybe not. Clearly in the U.S., with the number of

McBride - direct

1 U.S. patents, it's easier to predict than it would be in
2 some other jurisdiction in the world where IBM may not have
3 patents but the other party may have revenue. And so we
4 make an adjustment to the royalty rate based upon our
5 estimate of their revenue outside the United States.

6 Q. And are there any other discount factors?

7 A. Yes. When we enter into license discussions with
8 another party, the last thing we want, and I think the last
9 thing they want is for this to end up in litigation. And so
10 we reduce our royalty rate further as a way to try to avoid
11 litigation or prolong discussions that may be contentious.
12 And for that, we simply are willing to discount further to
13 avoid litigation. We call that a litigation discount.

14 Q. Now, out of those factors you just discussed, which
15 are the most important?

16 A. Well, the most important would be the license back
17 for their patents. The goal being to achieve freedom of
18 action, avoiding infringing their patents. And so typically
19 that is the most heavily weighted factor that we look at,
20 which is heavily dependent upon what we perceive as the
21 value of their portfolio in terms of the quantity of the
22 patent, the quality of the patents, and the technology areas
23 in which they're inventing, and whether or not those
24 technology areas are important or non-important to IBM.

25 Q. All right. So after you have the revenue and the

McBride - direct

1 gross royalty rate and your discount factors, what happens
2 next with the model?

3 A. Well, then I have, once it is approved, the ability
4 to make an offer to a cross licensee. And like I said
5 earlier, that is usually the first question, how much does
6 it cost? So when you sit down and talk to somebody, you
7 have the ability to give them a benchmark.

8 But in every case, we always say this is what we
9 think. We're open to considering a counteroffer to see what
10 you think. Our goal is a business resolution.

11 Q. All right. Now, in your licensing role at IBM, what
12 technology or types of companies do you focus on?

13 A. I'm responsible for the software sector as well as
14 web technology.

15 Q. And would you consider Groupon to be a web technology
16 company?

17 A. Yes.

18 Q. All right. Now I'd like to take a look the a some of
19 IBM's web technology licenses.

20 A. Sure.

21 Q. I'll run through a list of these and then we can come
22 back and walk through them.

23 Could you look in your binder to PX-391.

24 A. Yes.

25 Q. And what is that exhibit?

McBride - direct

1 A. Well, this would be the patent cross license
2 agreement between IBM and Facebook.

3 Q. And if you will please look at Plaintiff's Exhibit
4 PX-394. What is that exhibit?

5 A. This would be the patent cross license agreement
6 between IBM and Twitter.

7 Q. And if you look at Plaintiff's Exhibit PX-401. What
8 is that exhibit?

9 A. This would be the patent cross license agreement
10 between IBM and LinkedIn.

11 Q. And then if you look at Plaintiff's Exhibit PX-406.
12 What is that exhibit?

13 A. This would be the patent cross license agreement
14 between IBM and Amazon.

15 Q. And please look at Plaintiff's Exhibit PX-407. What
16 is that exhibit?

17 A. This would be a patent assignment agreement between
18 IBM and LinkedIn. This was done in conjunction with the
19 patent cross license agreement that we did with LinkedIn.

20 Q. And now please look at Plaintiff's Exhibit PX-408.
21 What is that exhibit?

22 A. This is a patent cross license agreement between IBM
23 -- I'm sorry. This is a patent assignment agreement between
24 IBM and Twitter. This agreement was also done at the same
25 time we did the patent cross license agreement with Twitter.

McBride - direct

1 Q. Just a few more. Plaintiff's Exhibit 443. What is
2 that exhibit?

3 A. Well, this is the confidential settlement agreement
4 between IBM and the Priceline Group which also included a
5 patent cross license.

6 Q. And then Plaintiff's Exhibit PX-454. What is that
7 exhibit?

8 A. This is a patent cross license agreement between IBM
9 and Facebook which was the renewal of the first license that
10 we already referenced.

11 Q. Then, finally, Plaintiff's Exhibit 461. What is that
12 exhibit?

13 A. This is the patent cross license agreement between
14 IBM and Google.

15 MR. MATTY: Your Honor, I offer PX-391, PX-394,
16 PX-401, PX-406, PX-407, PX-408, PX-443, PX-454, and PX-461.

17 MR. HADDEN: No objection.

18 THE COURT: Those are all admitted.

19 (Above-referenced exhibits admitted in evidence.)

20 BY MR. MATTY:

21 Q. All right. Mr. McBride, let's look through some of
22 these licenses.

23 I'm showing on the screen PX-406. Could you
24 tell me who are the parties to this license?

25 A. IBM and Amazon.

McBride - direct

1 Q. All right. Now I'll turn to, direct you to Section
2 2.12 of this license between IBM and Amazon, where it says:
3 Subject to Section 2.1.3.1, 2.1.3.2 and 2.1.3.3, Amazon, as
4 grantor, on behalf of its and its subsidiaries, grants to
5 IBM, as grantee, a nonexclusive and worldwide license under
6 Amazon licensed patents. And then it goes on from there.

7 Could you tell me, what is your understanding of
8 this section in this license?

9 A. This is where IBM is granting rights to Amazon to use
10 IBM patents that are relevant to their business.

11 Q. And I'll just point back in Section 2.1.2. It says
12 Amazon, as grantor, on behalf of itself and its subsidiaries
13 grants to IBM.

14 A. Yes, certainly.

15 Q. What is your understanding?

16 A. This is a license back to IBM from Amazon to IBM, for
17 IBM to be able to use patents that are in their portfolio.

18 Q. All right. And we'll look now at Section 4 of this
19 license. What was the amount that Amazon paid for this
20 license?

21 A. Yes. Amazon paid \$49.8 million.

22 Q. Now, did IBM apply a cross license discount for that
23 license to Amazon?

24 A. Yes, certainly we did that in our original offer.
25 After that, it would have been a negotiated settlement.

McBride - direct

1 Most often the negotiated settlement is less than original
2 offer, so we certainly would have taken into consideration
3 the license back from Amazon.

4 Q. And did IBM apply a litigation discount for that
5 license to Amazon?

6 A. We did in our original offer, we did end up in
7 litigation with Amazon, but it was settled prior to trial.

8 Q. Did IBM offer a discount to Amazon for settling prior
9 to trial?

10 A. Please ask that again.

11 Q. Did IBM apply a discount to Amazon for settling prior
12 to trial?

13 A. Yes. It would have been a discount to arrive at a
14 negotiated settlement.

15 Q. All right. I would like to turn now to the license
16 in PX-394. And who are the parties to that license?

17 A. This would be IBM and Twitter.

18 Q. All right. And I'll turn to Section 2.1.2 of this
19 license which says, "Twitter as Grantor on behalf of itself
20 and its subsidiaries grants to IBM as Grantee a nonexclusive
21 and worldwide license under Grantor's licensed patents."

22 Then it goes on from there. What is your
23 understanding of this section in IBM's license with Twitter?

24 A. This would be the license back from Twitter giving
25 IBM the right to use their patents that are relevant to our

McBride - direct

1 business.

2 Q. And so did IBM apply a cross license discount for
3 that license grant from Twitter?

4 A. Yes, we would have used our BOE model to create an
5 original offer. We would have applied an adjustment,
6 discount to arrive at a price based upon a license back for
7 this patent.

8 Q. Did IBM apply a litigation discount for Twitter?

9 A. Yes, we did.

10 Q. Was there any litigation between IBM and Twitter?

11 A. No, there was not.

12 Q. Look now at PX-408, which is the patent assignment
13 agreement. And who are the parties to this patent
14 assignment agreement?

15 A. This would be between IBM and Twitter.

16 Q. And how does this patent assignment agreement relate
17 to the license with Twitter that we just saw?

18 A. As I mentioned earlier, the patent license agreement
19 and the patent assignment agreement were done at the same
20 time in tandem. There was one price for both. And that
21 price I believe is reflected in the patent assignment
22 agreement. As a result of it, in addition to getting a
23 license, a patent cross license, Twitter purchased from IBM
24 a certain number of patents that they now own and is part of
25 their patent portfolio.

McBride - direct

1 Q. So we'll look now at Section 3 of this agreement.
2 What was the amount that Twitter paid for the patent
3 assignment agreement for the patent cross license with IBM?

4 A. Twitter paid \$36 million.

5 Q. All right. Let's go to the license in PX-401. And
6 who are the parties to that license?

7 A. This would be IBM and LinkedIn Corporation.

8 Q. I'll direct you to Section 2.1 of the license, which
9 says, "Each party, as Grantor, on behalf of itself and its
10 subsidiaries, grants to the other party, as Grantee, a
11 nonexclusive, royalty free and worldwide license under
12 Grantor's licensed patents." And then it goes on.

13 What is your understanding of that section in
14 this agreement?

15 A. This is written a little different than the other two
16 agreements but essentially what it says is they are giving
17 us a grant of rights to use their patents, we in turn are
18 giving them a grant of rights to use our patents.

19 Q. Did IBM apply a discount for that cross license grant
20 in PX-401?

21 A. In making our original offer we would have used our
22 standard BOE model, we would have applied the appropriate
23 adjustments.

24 Q. Would that have included a cross license discount?

25 A. A license back.

McBride - direct

1 Q. Did IBM apply a litigation discount for LinkedIn?

2 A. Yes, we did.

3 Q. Was there any litigation between IBM and LinkedIn?

4 A. No.

5 Q. Let's look at PX-406 -- I'm sorry, PX-407. And I'll
6 ask you who are the parties to this patent assignment
7 agreement?

8 A. This would be IBM and LinkedIn Corporation.

9 Q. And how does this patent assignment agreement in
10 PX-407 relate to the cross license we just saw in PX-401?

11 A. This is very similar to the Twitter situation in that
12 the patent assignment agreement was done at the same time as
13 the patent cross license agreement. And the price for both
14 was included in the patent assignment agreement.

15 Q. I'll show you Section 3 of this agreement. What was
16 the amount that LinkedIn paid for this patent assignment
17 agreement and patent cross license with IBM?

18 A. \$30 million.

19 Q. Let's go to PX-443. And who are the parties to the
20 agreement in PX-443?

21 A. This would be IBM and the Priceline Group, which
22 included Kayak, OpenTable, and Priceline.com.

23 Q. All right. I'll turn to Section 2.1.2 of this
24 license, which says, "Priceline as Grantor on behalf of
25 itself and its subsidiaries grants to IBM and its

McBride - direct

1 subsidiaries existing on or after the agreement date, as
2 Grantee a nonexclusive and worldwide license under Grantor's
3 licensed patents."

4 What is your understanding of this section of
5 the Priceline agreement?

6 A. Yes, this would be the license back to IBM that
7 Priceline is giving IBM a price to use its patents that are
8 relevant to IBM.

9 Q. Did IBM apply a cross license discount for Priceline?

10 A. In making the original offer, we did.

11 Q. And did IBM apply a litigation discount to the
12 Priceline agreement?

13 A. In making the original offer, we did, yeah.

14 Q. And then was there litigation between IBM and
15 Priceline?

16 A. There was, yes.

17 Q. And did IBM discount for avoiding further litigation
18 when it settled that case?

19 A. We settled for less than our original offer, so we
20 would have certainly taken into consideration a way to
21 achieve a mutually agreed business settlement.

22 Q. Turning to Section 3.2 of that license, what was the
23 amount that the Priceline agreement paid for the product
24 license agreement?

25 A. \$34 million.

McBride - direct

1 Q. And then if I go to page three of the settlement
2 agreement, I see a reference to another \$6 million. What is
3 that?

4 A. Well, there is currently an appeal process under
5 which, and based upon the results of that appeal process,
6 the Priceline Group may owe IBM another \$6 million.

7 Q. All right. Let's go now to the license in PX-391.
8 Who are the parties to that license?

9 A. IBM and Facebook.

10 Q. And we'll turn to Section 2.1.2 of IBM's license to
11 Facebook. It says, "Subject to Sections 2.13 and 2.16,
12 Facebook as Grantor on behalf of itself and its subsidiaries
13 grants to IBM as grantee a nonexclusive and worldwide
14 license under Grantor's licensed patents."

15 What is your understanding of that term in this
16 license?

17 A. This would be the license back from Facebook to IBM
18 giving IBM rights to use their patents.

19 Q. And so did IBM apply a cross license discount for
20 Facebook?

21 A. Yes, we did.

22 Q. And did IBM apply a litigation discount for Facebook?

23 A. Yes.

24 Q. Was there litigation between IBM and Facebook?

25 A. No, there was not.

McBride - direct

1 Q. Moving to Section 4 of IBM's license with Facebook,
2 what was the amount that Facebook paid IBM for this license
3 in 2011?

4 A. \$10 million.

5 Q. And we'll turn to PX-454. And who are the parties to
6 this license?

7 A. This would be IBM and Facebook.

8 Q. And how does this license relate to the IBM/Facebook
9 license that we just looked at?

10 A. The original Facebook license was a term license, and
11 at the end of that it was renewed, so this is the renewal
12 license for another five-year term.

13 Q. I'm showing you Section 4 of the renewal license.
14 What was the amount that Facebook paid IBM for this renewal
15 license in 2017?

16 A. \$10 million.

17 Q. All right. Last one. If we go to PX-461. Who are
18 the parties to that license?

19 A. This would be IBM and Google.

20 Q. I'll show you Section 2.1.2 of IBM's license with
21 Google which says, "Subject to the terms and conditions
22 contained in this agreement, Google as Grantor on behalf of
23 itself and its subsidiaries, grants to IBM, as Grantee, a
24 nonexclusive and worldwide license under Grantor's licensed
25 patents."

McBride - direct

1 What is your understanding of that term in this
2 license?

3 A. This is to grant to IBM from Google for the rights to
4 use the Google patents that are relevant to IBM's business.

5 Q. And is Groupon a party to the license in PX-461?

6 A. No.

7 Q. So did IBM apply a cross license discount for Google
8 in this agreement?

9 A. Certainly we did in our original offer.

10 Q. And did IBM apply a litigation discount for Google?

11 A. Yes, we did.

12 Q. Was there litigation between IBM and Google?

13 A. No, there was not.

14 Q. I'll turn to Section 4 of IBM's license with Google.
15 And what was the amount that Google paid IBM for this
16 license?

17 A. \$35 million.

18 Q. All right. Now, Groupon's counsel told the jury in
19 opening statements that Groupon is licensed to practice
20 IBM's '346 patent because of the Facebook and Google
21 licenses. So I want to look at a couple of the grant
22 provisions in those licenses.

23 First I'll go to PX-454, which is IBM's license
24 with Facebook. I'll show you Section 2.3, which reads,
25 "Except as expressly provided herein, no license or immunity

McBride - direct

1 is granted under this agreement by either party, either
2 directly or by implication, estoppel or otherwise, to any
3 third parties acquiring items from either party the
4 combination of such acquired items with other items
5 (including items acquired from either party hereto) or for
6 the use of such combination."

7 What is your understanding of that term in this
8 license?

9 A. Well, my understanding is that simply because you use
10 Google doesn't give you the right to use any of the patents.

11 Q. So then I'll turn to PX-461 which is IBM's license
12 with Google and I'll point to Section 2.3, which reads,
13 "Except as expressly provided herein, no license or immunity
14 is granted under this agreement by either party, either
15 directly or by implication, estoppel or otherwise to any
16 third parties acquiring items from either party for the
17 combination of such acquired items with other items
18 (including items acquired from either party hereto) or for
19 the use of such combination."

20 What is your understanding of that term in this
21 license?

22 A. What agreement is this, again?

23 Q. This is Google?

24 A. I misspoke earlier.

25 Q. So in PX-454, we saw Section 2.3 which we read, and

McBride - direct

1 what is your understanding of this section in that license?

2 A. This is the Facebook agreement?

3 Q. If we look at the cover of PX-454, who are the
4 parties to that license?

5 A. IBM and Facebook.

6 Q. And then in Section 2.3, what is your understanding
7 of that section?

8 A. Here, again, simply because you use Facebook does not
9 give you the right to use IBM patents.

10 Q. So I'll switch back to PX-461 which is IBM's license
11 with Google, and what is your understanding of Section 2.3
12 of that license?

13 A. Simply because you use Google does not give you the
14 right to IBM patents, rights to use IBM patents.

15 Q. All right. Now go back to PDX-5 on slide two, I see
16 you have a summary of the six licenses that we just walked
17 through, and you have a column of green checks in the center
18 column. What does that represent?

19 A. This would be the discount considerations that we
20 made in all cases for certainly a license back as well as
21 litigation avoidance to the extent possible.

22 Q. And those discounts for cross license and litigation
23 avoidance were applied in each one of these six cases?

24 A. Yes.

25 Q. All right. Let's talk a little bit about the patents

McBride - direct

1 in this case and Groupon. First, how many patents for web
2 technologies does IBM hold in its portfolio?

3 A. I couldn't give you an exact number, but it's
4 probably in the thousands.

5 Q. And how would you characterize the four patents in
6 this case with respect to that web technology portfolio?

7 A. Well, these four patents I would call similar
8 patents. They are used widely within the web technology
9 world. They're used widely outside of the web technology
10 world in the building of websites, but websites that may not
11 be revenue producing.

12 Q. Now, the jury has heard that Groupon first became
13 aware of the '967 patent and the '849 patent in November
14 2011 and first became aware of the '601 patent in April
15 2012, and Groupon first became aware of the '346 patent in
16 August 2014. How did IBM choose the patents in this case to
17 approach Groupon with?

18 A. Well, first of all, we had evidence of infringement
19 which we showed to Groupon.

20 MR. HADDEN: Objection, Your Honor.

21 THE COURT: What's the objection?

22 MR. HADDEN: We have a MIL on this.

23 MR. MATTY: Let me reask the question to make it
24 clear.

25 THE COURT: Let's try it again.

McBride - direct

1 BY MR. MATTY:

2 Q. Prior to Groupon finding out there was a patent in
3 this case, what did IBM do to investigate Groupon's use of
4 those patents?

5 A. Well, our patent engineers and patent attorneys would
6 have investigated to determine if IBM patents were being
7 used, we would have built the evidence of use, claim charts,
8 and that process inside IBM is a multilevel review. First
9 of all, the lead attorney. Secondly, the next level IP law
10 attorney review, and a third level IP law attorney review,
11 and to determine that to the best of our ability we believe
12 that infringement is occurring.

13 Q. And when did IBM file this lawsuit?

14 A. We filed it in March of 2016.

15 Q. So I guess you're unable to conclude a license with
16 Groupon; right?

17 A. Correct.

18 Q. Groupon's counsel said in its opening statement that
19 IBM has a business in which IBM uses its huge stock of
20 patents as a club to get money from other companies. Does
21 IBM file a lot of patent lawsuits?

22 A. No. In the last twelve years there have been four.
23 Amazon in 2007, which was settled prior to trial. Priceline
24 in 2014, which was settled prior to trial. Groupon, as we
25 know today. And then in 2018 we filed against Expedia for

McBride - direct

1 the same set of patents. So four in the last twelve years.
2 And this is the first ever that has -- first ever patent
3 case that's gone to trial.

4 Q. And so why did IBM decide to file this lawsuit?

5 A. Well, we were hoping to achieve negotiated business
6 resolution but were unable to.

7 MR. MATTY: Your Honor, I pass the witness.

8 THE COURT: Okay. Thank you.

9 Cross-examination.

10 MR. HADDEN: Does it make sense to take a break
11 now?

12 THE COURT: Okay. Sure. We can take a break.
13 That's fine.

14 Ladies and gentlemen, no talking about the case
15 during the break. We'll get you back in a little bit.

16 (Jury left courtroom.)

17 THE COURT: We'll take a recess.

18 (Brief recess taken.)

19 * * *

20 (Proceedings reconvened after recess.)

21 THE COURT: We'll bring the jury in.

22 (Jury returned.)

23 THE COURT: All right. We are ready to proceed.

24 Mr. Hadden.

25 MR. HADDEN: Good morning. May I approach, Your

McBride - cross

1 Honor? I have some documents.

2 THE COURT: You may approach.

3 (Binders passed forward.)

4 CROSS-EXAMINATION

5 BY MR. HADDEN:

6 Q. Now, when you are finishing the testimony, Mr.
7 McBride, you put up, your counsel put up some numbers for
8 some settlements and license agreements that IBM had entered
9 with various parties. Do you recall that?

10 A. Yes.

11 Q. And those are companies like Amazon and Google and
12 Facebook. Right?

13 A. Yes.

14 Q. Okay. And those license fees like the \$35 million
15 that Google paid, that was for a license for all of IBM's
16 portfolio; right?

17 A. That is relevant to their business per the definition
18 of their business in the contract.

19 Q. Right. So basically Google got the right to all
20 40,000 plus of IBM's patents to the extent Google needed any
21 of those patents for its business; right?

22 A. Yes.

23 Q. Okay. And this case only involves four patents,
24 right?

25 A. Right.

McBride - cross

1 Q. So however the jury decides this case, IBM could
2 come back after Groupon for the rest of its 40,000 patents;
3 right?

4 A. Yes.

5 Q. And on the numbers that you put up, one of them was
6 for Amazon; right?

7 A. Yes.

8 Q. And IBM didn't give Amazon a litigation discount, did
9 it?

10 A. Well, we were already in the litigation but as I
11 said, the original offer would have included a litigation
12 discount. My belief is that the settlement amount was less
13 than the original offer.

14 Q. Okay. But the original offer that may have had
15 litigation discount was not the number that the parties
16 settled on, was it?

17 A. Well, the parties settled on the number that is in
18 the agreement.

19 Q. Right. And that number was not the offer that IBM
20 made with the litigation discount; right?

21 A. Most likely it was less.

22 Q. And, in fact, IBM sued Amazon twice; right?

23 A. Well, there were two sets of patents, yes. So two
24 complaints.

25 Q. And IBM sued Amazon in the Eastern District of Texas

McBride - cross

1 twice; right?

2 A. Please ask that again.

3 Q. IBM sued Amazon in the Eastern District of Texas;
4 right?

5 A. I assume there is a record of that. I don't know,
6 myself.

7 Q. Okay. And IBM didn't assert the '601 patent against
8 Amazon, did it?

9 A. I'm not familiar with the Amazon case.

10 Q. And Priceline didn't get a litigation discount
11 because IBM sued Priceline?

12 A. We were in litigation with Priceline. However, the
13 settlement amount was less than the original offer.

14 Q. Now, if I understood your VOE model, could you remind
15 the jury what does VOE stand for?

16 A. It stand for Vendor Objective Evidence.

17 Q. Okay. If I understood what you said, you said that
18 IBM will go to a company and demand .25 of that company's
19 revenue even though IBM has not even a suspicion that the
20 company is using IBM's patents; is that correct?

21 A. Actually it's less than .25 because the adjustments
22 would have to be applied. Once adjustments are applied,
23 it's less than .25.

24 Q. Okay. So IBM goes to companies that it has no
25 suspicion it even uses their patents and demands .25 percent

McBride - cross

1 of their revenue with some adjustments; is that right?

2 A. .25 percent with adjustments would constitute the
3 original offer. As I also said, the original offer is one
4 where we always ask for a counteroffer because we're
5 interested in a negotiated business resolution.

6 Q. Okay. You referred to it as an offer but if someone
7 comes to me and says "pay me," I would view that as a
8 demand. You are not offering; right?

9 A. No, it's an offer.

10 Q. Now, IBM did not sell or offer for sale any products
11 that are covered by the four patents in this suit, does it?

12 A. Ask that again.

13 Q. IBM does not sell any products that are covered by
14 the patent that IBM is asserting in this case; correct?

15 A. Well, I'm not an engineer, but I believe that
16 certainly one of the patents is used in IBM products.

17 Q. Okay. Could we -- you were deposed in the Priceline
18 litigation, weren't you, Mr. McBride?

19 A. Yes, I was.

20 Q. If you look in your binder I gave you, the first tab
21 should have your Priceline deposition. If you would look at
22 page 28, lines 3 through 8.

23 "Question: To your knowledge, sir, does IBM
24 sell or offer for sale any products that are covered by the
25 four patents-in-suit?

McBride - cross

1 "Answer: I do not believe so."

2 BY MR. HADDEN:

3 Q. And you were under oath in that deposition, weren't
4 you, sir?

5 A. Right.

6 Q. And the four patents-in-suit in the Priceline case
7 are the same four patents-in-suit in this case; correct?

8 A. Right. And at the time, I didn't know the answer but
9 now I do.

10 Q. And as I think you testified earlier, part of IBM's
11 patent business is focused on web technology companies; is
12 that right?

13 A. Yes, we have done a number of licenses with web
14 technology companies.

15 Q. You have a group that is going to, or at least an
16 individual in charge of that group, Mr. Kalb, right?

17 A. John Kalb was responsible for the web technology
18 group. I was helping out.

19 Q. And as part of your and Mr. Kalb's efforts in the Web
20 Technology Group, IBM has approached every significant
21 company in the web technology space asserting patents
22 against them; right?

23 A. Well, we have certainly approached a number. I have
24 no idea how many we haven't approached. There are a number
25 of companies in the web technology space.

McBride - cross

1 Q. But you have approached every significant company in
2 the web technology case asserting IBM's patents; correct?

3 A. Well, you would have to be more specific. I would
4 have to know the company.

5 Q. Okay. You were deposed in this case as well, Mr.
6 McBride, weren't you? In the Groupon case, you had your
7 deposition taken?

8 A. Yes, I did.

9 Q. Okay. And if you look in your binder, the second
10 tab, is your deposition in this case. If we could look at
11 page 91, line 24 to page 92, line 7.

12 This is MT 52.

13 "Question: How many web companies has IBM
14 approached with the Filepp patents?

15 "Answer: I couldn't give you an exact number,
16 but you could assume that anybody in the web technology
17 space who is significant has probably been approached by
18 those patents, starting with Amazon in 27 --
19 twenty-oh-six -- twenty -- 2006, 2007."

20 BY MR. HADDEN:

21 Q. Now, IBM approached Groupon because Groupon was
22 operating on the World Wide Web and was growing quickly. Is
23 that true?

24 A. Yes, Groupon came to our attention in 2010 mainly
25 because Google had made an offer to buy them.

McBride - cross

1 Q. So you thought Groupon was a valuable company, so you
2 went after them with your patents?

3 A. Well, they simply came to our attention and so we
4 investigated.

5 Q. And IBM has gone after all of the online travel
6 companies, haven't they?

7 A. Yes, but, you know, the online travel industry has
8 changed dramatically since 2011.

9 Q. That was a yes-or-no question, sir. So the answer is
10 yes; right?

11 A. The answer is yes, we have investigated the online
12 travel companies.

13 Q. Right. And you have accused Trip Advisor of
14 infringing your patents; right?

15 A. Yes.

16 Q. And you have accused Expedia of infringing your
17 patents. In fact, you sued Expedia; right?

18 A. Yes.

19 Q. And you accused Orbitz of infringing your patents?

20 A. Yes.

21 Q. And you have accused HomeAway?

22 A. Yes.

23 Q. And you have accused AirBNB?

24 A. Yes.

25 Q. You have also gone after social media companies;

McBride - cross

1 right?

2 A. Well, I wouldn't say gone after. I think we have
3 approached them, yes.

4 Q. Well, you have accused them of infringement; right?

5 A. Well, can you be specific as to who?

6 Q. Yelp.

7 A. Yes, Yelp was put on notice for infringement.

8 Q. Okay. Twitter. You accused Twitter of infringement?

9 A. Yes.

10 Q. You accused Facebook of infringement?

11 A. Yeah, I believe they were on those also.

12 Q. You accused LinkedIn of infringement?

13 A. Yes.

14 Q. And you mentioned this with your counsel, but IBM
15 prioritizes who it's going to go after based on how much
16 revenue they have; right?

17 A. Well, revenue is an important consideration, yes.

18 Q. Okay. And you talked about assignments. An
19 assignment is when you sell a patent; right?

20 A. That is correct.

21 Q. And IBM sells patents, as you talked about; correct?

22 A. Yes, we do sell patents.

23 Q. And IBM sells patents to what are called NPEs, right?

24 A. We have sold patents to nonpracticing entities, yes.

25 Q. Okay. And an NPE is a company that gets patents but

McBride - cross

1 doesn't sell products or services?

2 MR. MATTY: Objection, relevance.

3 THE COURT: Sorry?

4 MR. MATTY: Objection, relevance.

5 THE COURT: Do you want to respond?

6 MR. HADDEN: Sure. It's important to understand
7 the licensing business and how they deal with NPEs.

8 THE COURT: The objection is overruled. Go
9 ahead.

10 MR. HADDEN: Thank you.

11 BY MR. HADDEN:

12 Q. Is that correct, Mr. McBride?

13 A. Could you repeat the question, please?

14 Q. Sure. An NPE is a company that gets patents but
15 doesn't make products or services; right?

16 A. Yes, and they do not practice the patents that they
17 own.

18 Q. Right. So they get the patents and then they use
19 them primarily to sue people or threaten people with
20 lawsuits; right?

21 A. One of the characteristics of a -- well, first of
22 all, there are various kinds of NPEs, nonpracticing
23 entities. I mean some universities are nonpracticing
24 entities. RPX, ASD are nonpracticing entities, own patents,
25 that are not litigious.

McBride - cross

1 There are a class of NPEs that are litigious.

2 And IBM has sold patents to a few of those companies.

3 Q. Right. And those litigious NPEs, you refer to those
4 as patent trolls; right?

5 A. That's the term that is typically applied, yes.

6 Q. And that is a term you use; right?

7 A. We use that term, yes.

8 Q. Right. And you, IBM, would sell patents to patent
9 trolls?

10 A. We have sold to a few. Now, there are a lot of them
11 out there. We are somewhat selective in who we sell to.

12 Q. So you pick the good trolls?

13 A. Say again?

14 Q. You pick the good trolls to sell your patents to?

15 A. Well, we, like I said, we're selective in who we sell
16 patents to.

17 Q. And when IBM sells patents to patent trolls, IBM
18 includes a provision in the agreement that protects IBM;
19 right? It prevents the patent troll from coming back and
20 suing IBM?

21 A. Well, that is one of the benefits to selling patents
22 to an NPE is that we achieve some level of protection from
23 being sued ourselves.

24 Q. Right.

25 A. And in the industry, there are really very few

McBride - cross

1 protections you have against patent trolls and so if a
2 patent troll wants to buy a patent from us, then we insist
3 on a covenant not to sue IBM. And we also try to achieve
4 protections for our strategic partners and customers in
5 doing so.

6 Q. Right. But for the rest of the world -- right? --
7 when you sell to the patent troll, you include protection
8 for yourself because you know the patent troll is going to
9 go sue and threaten other companies, those companies don't
10 get any protection in that sale, do they?

11 A. Well, they have to protect themselves.

12 Q. Okay. Let me ask you, sir, to look in that binder I
13 gave you to DX-27.

14 Did you find that, sir?

15 A. I did.

16 Q. Okay. Do you recognize this document, Mr. McBride?

17 A. It looks like the Project Management presentation to
18 Netflix.

19 MR. HADDEN: I move DX-27 into evidence, Your
20 Honor.

21 MR. MATTY: No objection.

22 THE COURT: It's admitted.

23 (DX-227 was admitted into evidence.)

24 BY MR. HADDEN:

25 Q. So DX-27, as you said, is a presentation that IBM put

McBride - cross

1 together for Netflix; is that correct?

2 A. That's correct.

3 Q. And the purpose of this presentation was to try to
4 entice Netflix to buy some patents there IBM; is that
5 correct?

6 A. Well, not exactly. What we were doing is conducting
7 a private auction in 2013. We called it Project Maui. We
8 sent this management presentation to Netflix as well as
9 roughly 20 to 25 other companies that we thought might be
10 interested in buying the patents in the portfolio. There
11 were roughly 160 patents in the portfolio.

12 Q. And the patents in that portfolio that you offered
13 to Netflix and the other companies included the two Prodigy
14 patents that are in this case?

15 A. Yes, the '849 and '967.

16 Q. And in this presentation that you put together for
17 Netflix, did you put together similar presentations for the
18 other companies you were trying to get involved in the
19 auction?

20 A. We did, yes.

21 Q. Okay. And if we look at the page that has the number
22 in the bottom, 2393. Put that up, Brian.

23 So this is -- one page earlier. Sorry.

24 So this is kind of a description of one of the
25 Prodigy patents that you included in this presentation,

McBride - cross

1 isn't it, Mr. McBride?

2 A. Yes.

3 Q. Okay. And then if we go to 2393, if we look at the
4 URL that's under the image on the left, that's the website
5 for CBS; right?

6 A. Yes.

7 Q. And so above that you have a screen shot from the CBS
8 website with some arrows and indications on it; right?

9 A. Yes.

10 Q. So the purpose of this was to try to demonstrate to
11 Netflix that CBS was infringing this patent; right?

12 A. Well, not so much infringing as well as they are --
13 they were implicated by the patent because there was no real
14 evidence or proof presented that they were infringing.

15 Q. You say implicated by the patent. Isn't the purpose
16 of this diagram that we see up here with the arrows to try
17 to map CBS's website to the patent?

18 A. I'm not sure I understand your question.

19 Q. Sure. Isn't the purpose of what we see on the screen
20 an attempt to map CBS's website to claim, which is shown on
21 the prior page, the representative claim of the patent?

22 A. Yes. This is a common approach where essentially the
23 buyer is always interested in who may be using the patent.

24 Q. So -- I'm sorry, I didn't mean to cut you off?

25 A. Yes. And so, therefore, you want to show them

McBride - cross

1 something that would give an indication of use.

2 Q. So did IBM's patent engineers prepare these
3 demonstrations of use that were used in this presentation?

4 A. Yes.

5 Q. And they did it for I assume the other twenty-five or
6 so companies that were involved in the auction?

7 A. The same presentation would have been made to those
8 others, yes.

9 Q. So if we look forward in this presentation to page
10 2395, there is another one of these demonstrations by your
11 patent engineers. This one is accusing, if we go to the
12 bottom, ABC. Do you see that?

13 A. Yes.

14 Q. So IBM was telling Netflix that ABC infringed this
15 patent; is that right?

16 A. We were telling them that there was some indication
17 that ABC might be using this patent.

18 Q. And if we go forward to 2397, look at the URL, this
19 is accusing a company called Aereo.com, do you see that?

20 A. Yes, I do.

21 Q. That was prepared by IBM's patent engineers as well?

22 A. It was.

23 Q. Let's go to 239. Blow up the bottom there. And this
24 is another one where IBM is accusing Cox of infringing this
25 patent; right?

McBride - cross

1 A. Like I said, this is simply an indication that Cox
2 may be using the patent.

3 Q. And similarly if we go to 2401, we blow up the bottom
4 there, here you're accusing Hulu of using the patent; right?

5 A. Here again, this is showing that Hulu may be using
6 the patent, it's not an assertion of infringement.

7 Q. If we go forward in this same document, do you a
8 similar set of infringement proofs for the '849 patent? If
9 you look at 2409, do you see that?

10 A. Yes.

11 Q. So here you have a representative claim, claim 1 of
12 the '849 patent; right?

13 A. Yes.

14 Q. If we go to 2411, blow up the URL. Here you're
15 mapping the representative claim to Fox; right?

16 A. Here we're indicating that Fox may be using the
17 patent.

18 Q. And if we go to -- let's go to 2413, Brian.

19 Here you're accusing NBC of using the patent;
20 right?

21 A. Here we're giving an indication that NBC may be using
22 the patent.

23 Q. In all these cases you're just pointing to these
24 companies' websites; right?

25 A. Yes.

McBride - cross

1 Q. So the common factor of all these companies you're
2 accusing is that they are on the worldwide web with these
3 websites; right?

4 A. Well, these are web patents.

5 Q. Let's look at 2414. Here you're accusing TIVO of
6 using the patent; right?

7 A. Here we're saying that TIVO may be implicated by the
8 patent.

9 Q. Let's go to 2415. Blow that up. Here you're
10 accusing Direct TV of using the patent; right?

11 A. There are indications that Direct TV may be using the
12 patent.

13 Q. And if we go to 2416. Here you're accusing Verizon
14 of using the patent; right?

15 A. There are indications that Verizon may be using the
16 patent.

17 Q. And finally if we go to 2417, blow that up. Here
18 you're accusing Cox, Cox Cable Company?

19 A. Yes, there were indications that Cox may be using the
20 patent.

21 Q. Now, you have a personal quota of money you have to
22 bring in to IBM or you're expected to bring in to IBM for
23 its patents every year, aren't you?

24 A. I wouldn't call it a quota, I would call it an
25 objective. My objective is cross licensing and patent

McBride - cross

1 assignment transactions equivalent to 2.5 million a quarter.

2 Q. So that's \$10 million a year?

3 A. Ten million a year.

4 Q. Let me ask you to look in your binder to PX-391.

5 This is the Facebook agreement that you discussed with IBM's
6 counsel. I'll give you a minute to get there. Sorry. Do
7 you have the agreement?

8 A. I have it, yes.

9 Q. Again, this was an agreement whereby Facebook would
10 get rights to all 40,000 plus of IBM's patents to use any of
11 which that were relevant to its business?

12 A. That's correct.

13 Q. And for that, for a five-year term, Facebook paid \$10
14 million?

15 A. Yes.

16 Q. If you look on the first page of that agreement,
17 which is 373, there is a definition of Facebook licensed
18 products. Do you see that?

19 A. I do.

20 Q. And it starts out and it says -- blow up just the
21 first chunk of that, Brian.

22 It says, "Licensed products shall mean any
23 software IH product that facilitates or otherwise permits
24 the transfer or publishing of data, information or content
25 across a communications network (wired or wireless) or

McBride - cross

1 computer network."

2 Do you see that?

3 A. Yes.

4 Q. That's a pretty broad definition, isn't it?

5 A. Yes, it's broad.

6 Q. And it goes on, and it talks about, "Allows analysis
7 of data, information, or content, facilitates the
8 manipulation of such data, information or content," then it
9 goes on and says, "including but not limited to social
10 networking products that allow the sharing and exchange
11 data, information, and content via websites, applications,"
12 et cetera, do you see that?

13 A. I do.

14 Q. So this license grant through Facebook includes
15 software that Facebook uses to share information with other
16 websites; right? Is that correct?

17 A. Could you ask the question again?

18 Q. Sure.

19 The license grant, the grant that IBM gave to
20 Facebook covered software that shared information, Facebook
21 software that shared information with other websites; right?
22 IBM explicitly authorized Facebook to share information with
23 other websites using products that are licensed by IBM;
24 right?

25 A. Yes, that's what it says.

McBride - cross

1 Q. If we look at the last sentence in that paragraph, if
2 we look at the very bottom, it says, "A given product may
3 include or otherwise consist of an application program
4 interface (API) to a Facebook licensed product or runtime
5 component (or similar Facebook created software component)."

6 Do you see that?

7 A. I do.

8 Q. So IBM in its license to Facebook licensed Facebook
9 to provide APIs; right?

10 A. Yes.

11 Q. And then it goes on and said, "And shall not cease to
12 be a Facebook licensed product merely because it is utilized
13 by a third party or otherwise accessed by a third party."

14 Do you see that?

15 A. I do.

16 Q. So IBM is saying Facebook can provide APIs to third
17 parties and the use of those third parties does not render
18 that not licensed. Isn't that what it says?

19 A. I can't comment on the not licensed part.

20 Q. It says that the license includes --

21 A. Yes.

22 Q. And shall not cease to be a Facebook licensed product
23 merely because it is utilized by a third party; right?

24 A. Yes.

25 Q. So it says third parties can use the APIs that IBM

McBride - cross

1 has licensed Facebook to provide, and they continue to be
2 licensed when they're used by those third parties; right?

3 A. That's what it says.

4 Q. And Facebook provides an API to Groupon that Groupon
5 uses to perform single-sign-on with Facebook; right?

6 A. I don't know how Groupon uses single-sign-on.

7 Q. So you don't know sitting here today, or at least you
8 have no opinion that Groupon's use of Facebook
9 single-sign-on is licensed or not licensed under this
10 agreement; right?

11 A. I don't think I'm qualified to make that
12 determination.

13 Q. So as far as you know, Groupon's use of Facebook's
14 APIs to perform single-sign-on is a licensed activity by
15 IBM; right?

16 A. I cannot make that determination.

17 Q. The same thing with Google, you don't have an opinion
18 because Groupon uses Google's APIs to perform single-sign-on
19 that somehow that is not licensed?

20 A. I'm not qualified to have an opinion.

21 Q. Now, you pointed in your testimony with IBM's counsel
22 to provision 2.3. If we could see that, Brian, it's on page
23 five.

24 A. The Facebook agreement.

25 Q. And if we highlight the first part of that, it says,

McBride - cross

1 "Except as expressly provided herein."

2 Do you see that?

3 A. I do.

4 Q. What that means is that IBM is not granting
5 additional licenses except if there is something else in
6 this agreement that indicates they are. That's what except
7 as expressly provided herein means; right?

8 A. I would think so, yes.

9 Q. So if other portions of this agreement, like the
10 license to provide APIs, allows Groupon to use Facebook APIs
11 in a licensed manner, nothing in 2.3 could be to the
12 contrary because 2.3 expressly excludes the other
13 provisions; right?

14 A. Here again, I don't think I'm qualified to render an
15 opinion.

16 Q. Let's look at the Google license, which is PX-454.
17 No, it's not. It's PX-461.

18 And before I get to that just so we're all
19 clear, you don't dispute that the Facebook license includes
20 a license to the '346 patent as being asserted here, do you?
21 The portfolio license to Facebook includes that patent;
22 right?

23 A. Yes, I would agree with that.

24 Q. And that's true of the Google license, too, the
25 portfolio license to Google includes the '346 patent?

McBride - cross

1 A. Certainly.

2 Q. And again, the Google license that Google paid \$35
3 million for, that is a license to all of IBM's 40,000 plus
4 patents; right?

5 A. That are relevant to Google.

6 Q. So Google can use any of IBM's 40,000 patents in its
7 business if they need them; right?

8 A. Yes.

9 Q. So let's look at page six of this agreement. And
10 there is the same Section 2.3 that you talked about with
11 IBM's counsel. Can we blow up the first part.

12 Again, that begins with the same language,
13 "Except as expressly provided herein," so there are
14 provisions in here that grant Google the rights to provide
15 its APIs to Groupon, they are not trumped by this provision
16 2.3; correct?

17 A. As I said earlier, I'm not sure I'm qualified to
18 render an opinion, but as I read the agreement, simply
19 because you use Google doesn't give you the right to use IBM
20 patents.

21 Q. But you're not standing here today and saying that
22 Groupon does not have the right to use Google API for
23 single-sign-on under this patent, are you?

24 A. They have the right to use APIs because they're
25 probably available from Google to anybody who wants to use

McBride - cross

1 them. That doesn't mean that Google has the right to use
2 IBM's patents.

3 Q. Let's be clear. IBM licensed Google this patent. If
4 Google API is covered as a licensed product and the license
5 provides the right for Google to provide that API to third
6 parties, you can't sue the third party using that API, can
7 you, Mr. McBride?

8 A. Certainly not.

9 Q. Okay. Let me ask you to look at DX-596 in your
10 binder.

11 MR. MATTY: Objection, Your Honor. The same MIL
12 that was discussed before.

13 MR. HADDEN: Can we have a side-bar, Your Honor?
14 (Side-bar discussion:)

15 THE COURT: All right. I don't know, is there
16 an objection?

17 MR. MATTY: So I think --

18 THE COURT: You have to speak up.

19 MR. HADDEN: Can I say what the issue is because
20 I don't want to cause an issue. We have a MIL about
21 pre-suit communications. These exhibits I want to show him
22 are the NDA between IBM and Groupon. I'm not going to talk
23 about what they disclosed in the NDA, but the terms of the
24 agreement are relevant because they explicitly say that IBM
25 will not seek willfulness or claim willfulness and even will

McBride - cross

1 not seek damages for some period. They're claiming
2 wilfulness and seeking damages for those periods.

3 MR. MATTY: So I have the briefing from the MIL,
4 and the basis of the objection is the whole reason that
5 Groupon filed the MIL and argued for it is that the
6 agreements were in place, they argued that because the
7 agreements were in place nothing from the pre-suit period is
8 relevant. And that there are provisions in here citing from
9 their briefing arguing based on the confidential disclosure
10 agreements that all the communications and the back and
11 forth between the parties are subject to 408 as are the
12 agreements themselves and that's because Groupon has
13 stipulated to the dates of awareness which are read into the
14 record that none of this is relevant.

15 THE COURT: But do you actually have an
16 agreement with Groupon that you will not sue them for
17 willful infringement?

18 MR. HADDEN: Yes.

19 THE COURT: Hold on.

20 MR. MATTY: That's certainly their
21 interpretation that they're advancing right now.

22 THE COURT: Is that something I was made aware
23 of at some point?

24 MR. MATTY: There was no summary judgment or
25 it's not been raised before.

McBride - cross

1 MR. OUSSAYEF: In the MIL briefing, Your Honor,
2 you were made aware of that fact. The issue was that in
3 between that period and the language in the NDA said that
4 we'll not sue based on conduct arising from the period under
5 the agreement, not that we wouldn't assert willful
6 infringement period, and that was all raised in the MIL.

7 THE COURT: Was it their MIL, it was Groupon's,
8 and I granted it?

9 MR. OUSSAYEF: Yes, that's correct. So now --
10 so now seeking to introduce just the portions of the
11 communication between the parties that are Groupon's without
12 allowing us to provide full back and forth between the
13 parties would be unfairly prejudicial. It was a sword and
14 shield situation, they invoked the shield and now they're
15 trying to invoke the sword.

16 MR. HADDEN: All I want to show is the
17 agreements to say that what they said -- Mr. Desmarais put
18 up this timeline saying we were reckless children continuing
19 to operate. The agreement explicitly saying we're not
20 asking to stop operating and we will not claim wilful
21 infringement for the experience, we are not taking about
22 what communications were made.

23 THE COURT: Didn't you ask me to keep out all of
24 these communication?

25 MR. HADDEN: I wanted to keep out the

McBride - cross

1 communications that are subject to the NDA, the agreement
2 itself. We are not going to seek damages or willfulness.

3 THE COURT: Does somebody have my order to the
4 MIL?

5 MR. MATTY: We do have the order that we can
6 grab.

7 THE COURT: Why don't you grab that and let me
8 see it.

9 MS. SHAMILOV: I have the order, Your Honor.

10 THE COURT: Thank you.

11 MS. SHAMILOV: What you grant --

12 THE COURT: I'm looking at the paragraph three.

13 MS. SHAMILOV: Correct, with respect to MIL
14 number one.

15 THE COURT: Thank you.

16 All right. Well, this has helped refresh my
17 recollection. Certainly you all did tell me about the NDA
18 and your various positions on it. It seems to me that you
19 persuaded me to keep all of this out, and it seems selective
20 to me, but help me understand why it wouldn't be?

21 MR. HADDEN: All I want is the agreement. If
22 they're going to argue willfulness and we were willfully
23 continuing --

24 THE COURT: It's been clear that they are going
25 to argue willfulness, notwithstanding what you --

McBride - cross

1 MR. HADDEN: I should be able to get the
2 contract in as evidence that we were not willful.

3 THE COURT: You asked me to keep all of that
4 out.

5 MR. HADDEN: What we wanted out were the
6 communications subject to the agreement where they say --

7 THE COURT: But they have their competing
8 interpretation of the agreement.

9 MR. HADDEN: The agreement will come in. They
10 can compete with the interpretation of the agreement.

11 THE COURT: They're going to want to put in the
12 communication about the agreement.

13 MS. SHAMILOV: About the amount of the
14 negotiation of the agreement, there is no communication
15 about that, their only communication are actual settlement.

16 MR. HADDEN: The agreements are what the
17 agreements are. There are no dispute about that, they're
18 just signed NDAs, standard NDAs.

19 MR. OUSSAYEF: Your Honor, this is exactly the
20 problem, they would like to open the door to the entire MIL
21 to give full context to the agreement we have, to go into
22 how the agreement was entered and the full communication
23 between the parties.

24 THE COURT: Why wouldn't it be adequate for you
25 to argue about the language of the NDA without going into

McBride - cross

1 the language of the communication?

2 MR. OUSSAYEF: Because if they wanted to make a
3 summary judgment argument, they could have done that. This
4 is telling the jury to try to interpret an agreement without
5 the context back and forth between the parties. It makes no
6 sense to do that.

7 MR. HADDEN: They opened the door in their
8 opening by saying we were willful because we knew about
9 these patents here and continued to operate. Not saying
10 that without having the context that there were NDAs that
11 said Groupon, we don't expect you to stop what you're doing,
12 we will not charge you willfulness, please proceed with your
13 business, how can the jury only get that side of it?

14 THE COURT: I'm with IBM on this. I think this
15 comes within the scope of my ruling. There couldn't have
16 been any surprise to you that they were going to say in
17 opening that you're a willful infringer. I'm afraid at this
18 point if I were to allow the jury to hear your disputes
19 about the legal interpretation of this NDA provision, in
20 fairness I would have to let both sides get in their
21 understanding of the content. And Groupon specifically
22 asked to keep all of that out pretrial and I did so.

23 Anything else?

24 MR. HADDEN: No.

25 THE COURT: Anything else?

McBride - redirect

1 MR. MATTY: No.

2 (Sidebar conference ends.)

3 THE COURT: Thank you for your patience, ladies
4 and gentlemen. We'll continue when you are ready, Mr.
5 Hadden.

6 MR. HADDEN: I have no further questions.

7 THE COURT: Any redirect?

8 MR. MATTY: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. MATTY:

11 Q. Now, Mr. McBride, you were asked a number of
12 questions about IBM's license with Facebook. Do you
13 remember that?

14 A. I do.

15 Q. And counsel pointed you to Section 2.3. Section 2.3
16 of that agreement regarding combinations which we discuss
17 the earlier. Do you remember that?

18 A. I do.

19 Q. Counsel pointed out that Section 2.3 notes, that it's
20 limited to an exception: Except as expressly provided here
21 in. Do you see that?

22 A. I do.

23 Q. And I want to show you Section 2.1.1 of that license.
24 I'm going to read it:

25 Subject to Section 2.14, IBM, as grantor, on

McBride - redirect

1 behalf of it and its subsidiaries grants to Facebook, as
2 grantee, a nonexclusive and worldwide license under
3 grantor's licensed patent?

4 Do you see that?

5 A. I do.

6 Q. What is your understanding of that section?

7 A. This is where IBM grants to Facebook a license to use
8 IBM's patents.

9 Q. And does that grant expressly grant any rights to
10 anyone other than Facebook?

11 A. No.

12 Q. You were asked a similar series of questions about
13 the Google license. Do you remember that?

14 A. I do.

15 Q. I want to show you Section 2.1.1 of the Google
16 license. This is PX-461. And I'll read that section:

17 IBM, as grantor, on behalf of itself and its
18 subsidiary receipts grants to Google, as grantee, a
19 nonexclusive and worldwide license under grantor's licensed
20 patents.

21 Do you see that?

22 A. Yes.

23 Q. What is your understanding of that term?

24 A. Well, this is where IBM is granting to Google the
25 right to use IBM patents.

McBride - redirect

1 Q. And does that section expressly grant any rights to
2 anyone other than Google?

3 A. No.

4 Q. All right. Now, I want to talk for one second about
5 Project Maui. You were asked some questions about a
6 presentation from Project Maui. Do you remember that?

7 A. Yes.

8 Q. And counsel from Groupon mentioned that the '967 and
9 '849 patents were part of that project. Do you remember
10 that?

11 A. Yes.

12 Q. And he showed you a number of slides that had
13 websites on them and asked if IBM was simply asserting that
14 use of websites meets those patents. Do you remember that?

15 A. Yes.

16 Q. All right. I want to go through some slide from this
17 presentation that he didn't show you. If you look at the
18 page ending in 394 -- I'm sorry -- 393. First, we see one
19 of the pages he did show you which had some pictures of a
20 website from CBS. Do you remember that?

21 A. Yes.

22 Q. If we flip over and go to the very next slide, we see
23 some more images here. And these images talk about things
24 like: cached files being deleted, cached files being no
25 longer available, and refreshing the application replaces

McBride - redirect

1 the files. Do you see that?

2 A. Yes, I do.

3 Q. So in IBM's presentation, did they just show websites
4 as evidence of potential use of this patent?

5 A. No, we show some of the internal workings.

6 Q. I'll show you another slide. This is the page ending
7 3955. And this is a website from ABC. Do you see that?

8 A. Yes.

9 Q. And Groupon's counsel asked you about ABC's website
10 in this presentation to the '967 patent. Do you remember
11 that?

12 A. I do.

13 Q. And, again, if we go to the next slide ending in 396,
14 you see reference to cached files again, cached files, and
15 refreshing the application replaces the files.

16 Do you see that?

17 A. Yes, I do.

18 Q. Did IBM's presentation only includes pictures of
19 websites to show potential use by ABC?

20 A. No, it showed the internal workings which seems to
21 indicate that they're using the patent.

22 Q. And then for the '849 patent, you were also asked
23 about DirecTV. Do you remember that?

24 A. Yes.

25 Q. I'll show you here a slide ending in 415 that

McBride - redirect

1 references the '849 patent and DirecTV; right?

2 A. Yes.

3 Q. And on the right, we have a web page and on the left
4 we have it looks like a list with some files. Do you see
5 that?

6 A. I do.

7 Q. Was IBM showing only a web page to show this patent
8 might be used?

9 A. Well, we're also showing what is underneath the web
10 page, the internal workings.

11 Q. And we'll go to one more. You were asked questions
12 about Cox. Do you remember that?

13 A. Yes.

14 Q. All right. And the slide deck that Groupon's counsel
15 didn't show you ending in 419 at the bottom, you see the Cox
16 website; right?

17 A. Yes.

18 Q. But on the left, you see again a list of files in a
19 window. Do you see that?

20 A. Yes, I do.

21 Q. Did IBM show only just the Cox website as evidence of
22 potential use of the '849 patent?

23 A. No, we showed the internal workings of the website
24 also.

25 MR. MATTY: No further questions, Your Honor.

1 THE COURT: Okay. Thank you, Mr. McBride. You
2 may step down.

3 MR. MATTY: And, Your Honor, I just want to
4 confirm may Mr. McBride be excused?

5 THE COURT: Any objection?

6 MR. HADDEN: No, Your Honor.

7 THE COURT: Yes, you may be excused. Thank you
8 again.

9 (Witness excused.)

10 MR. MATTY: Thank you, Your Honor.

11 THE COURT: Mr. Matty, if you wouldn't mind
12 grabbing the binders here, that would be helpful.

13 MR. MATTY: Yes, Your Honor.

14 THE COURT: Does IBM have anything further?

15 MR. DESMARAIS: Yes, Your Honor. Before we do
16 that, we'll read a little more discovery, if that is okay.

17 THE COURT: That's fine.

18 MR. OUSSAYEF: Ladies and gentlemen of the jury,
19 at this time, IBM will read some statements that the parties
20 have agreed are undisputed facts from the process of
21 preparing for trial.

22 From the Proposed Final Pretrial Order.

23 Uncontested Facts.

24 IBM is a New York corporation, with its
25 principal place of business at 1 New Orchard Road, Armonk,

1 New York, 10504.

2 Groupon is a Delaware corporation with a
3 principle place of business at 600 West Chicago Avenue,
4 Suite 400, Chicago, Illinois 60654.

5 United States Patent Number 5,769,967 ("the '967
6 patent") entitled "Method For Presenting Applications in an
7 Interactive Service," was issued August 18th, 1998 to named
8 inventors Robert Filepp, Kennett H. Appleman, Alan M. Wolf,
9 James A. Galambos, and Sam Meo.

10 The effective filing date of the '967 patent is
11 July 15th, 1988.

12 IBM is the owner of all substantial rights,
13 title, and interest in and to the '967 patent.

14 United States Patent Number 7,072,849 ("the '849
15 patent") entitled Method For Presenting Advertising in an
16 Interactive Service, was issued July 4th, 2006 to named
17 inventors Robert Filepp, Alexander W. Bidwell Francis C.
18 Young, Alan M. Wolf, Duane Tiemann, Mel Bellar, Robert D.
19 Cohen, James A. Galambos, Kenneth H. Appleman, and Sam Meo.

20 IBM is the owner of all substantial rights,
21 title, and interest in and to the '849 patent.

22 The effective filing date of the '849 patent is
23 July 15th, 1988.

24 United States Patent Number 5,961,601 ("the
25 '601 patent") entitled Preserving State Information in a

1 Continuing Conversation Between a Client and Server Network
2 Via a Stateless Protocol, was issued October 5th, 1999, to
3 named inventor Arun K. Iyengar.

4 IBM is the owner of all substantial rights,
5 title, and interest in and to the '601 patent.

6 The effective filing date of the '601 patent is
7 June 7th, 1996.

8 United States Patent Number 7,631,346 ("the '346
9 patent") entitled "Method and System For a Runtime User
10 Account Creation Operation Within a Single-Sign-on Process,
11 in a Federated Computer Environment," was issued December
12 8th, 2009, to named inventors Heather Maria Hinton, Ivan
13 Matthew Millman, Venkat Raghavan, and Shane Bradley Weeden.

14 IBM is the owner of all substantial rights,
15 title, and interest in and to the '346 patent.

16 The effective filing date of the '346 patent is
17 April 1st, 2005.

18 IBM filed this lawsuit on March 2nd, 2016.

19 IBM accuses Groupon's website of infringing the
20 patents-in-suit. IBM also accuses Groupon's Android and iOS
21 mobile applications of infringing the '849, '601, and '346
22 patents.

23 Groupon's website is available at
24 www.groupon.com.

25 Groupon's mobile applications are available for

1 download to Android and iOS phones.

2 Groupon does not have any policies for licensing
3 patents, but evaluates requests to license patents on a
4 case-by-case basis.

5 HTML stand for Hypertext Markup Language.

6 HTTP stand for Hypertext Transfer Protocol.

7 That concludes the reading of the undisputed
8 facts.

9 And, Your Honor, I offer PX-1564 into evidence.

10 MR. HADDEN: No objection.

11 THE COURT: It's admitted.

12 (PX-1564 was admitted into evidence.)

13 MR. OUSSAYEF: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MR. DESMARAIS: Thank you, Your Honor. Our next
16 witness will be Professor Hausman who is an economist. And
17 he will testify and give opinions on the damages issues
18 which relates to IBM's Bedrock Fact No. 3. And my colleague
19 Laurie Stempler will do the examination.

20 THE COURT: Thank you.

21 ... DR. JERRY HAUSMAN, having been first duly
22 sworn, was examined and testified as follows ...

23 THE COURT: Good morning, Dr. Hausman.

24 THE WITNESS: Good morning.

25 THE COURT: You may proceed when ready.

Hausman - direct

1 MS. STEPLER: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. STEPLER:

4 Q. Good morning, Mr. Hausman.

5 A. Good morning.

6 Q. Could you please tell the jury what you do for a
7 living?

8 A. I'm a McDonald Professor of Economics at the
9 Massachusetts Institute of Technology, usually called MIT,
10 in Cambridge, Massachusetts.

11 Q. What is MIT?

12 A. MIT is one of the leading research universities,
13 well, in the world, certainly in the United States.

14 Q. Why you are here to testify, Mr. Hausman?

15 A. I've been asked to determine what a reasonable
16 royalty would be for Groupon's use of IBM's four patents.

17 Q. We'll discuss that in detail but first let's learn a
18 little bit more about you. Where do you live?

19 A. Boston, Massachusetts.

20 Q. And do you spend all of your time in Boston?

21 A. No, I spend half a year at UCL and live in Los
22 Angeles because I have a granddaughter there.

23 Q. Where were you from originally, sir?

24 A. Sorry?

25 Q. Where are you from originally?

Hausman - direct

1 A. Oh, West Virginia.

2 Q. I have a binder of slides of exhibits for us to look
3 at today. Your Honor, may I approach?

4 THE COURT: You may approach.

5 (Binders passed forward.)

6 BY MS. STEPLER:

7 Q. Professor Hausman, you have in front of you a couple
8 binders. That I'd like to start with the one marked Volume
9 1, and behind the first tab are plaintiff's demonstratives
10 marked PDX-6. Do you see those?

11 A. Yes.

12 Q. And will that aid your testimony?

13 A. Yes.

14 Q. Okay. So let's take a look at those slides.

15 If you look at slide 2, Professor Hausman, what
16 is this showing here?

17 A. As I said, I was brought up and went to high school
18 in West Virginia. And this is my education. I went to
19 Brown in Rhode Island. And then I won a Marshall
20 Scholarship and went to Oxford where I did a D. Phil which
21 is the English equivalent of the American Ph.D.

22 Q. What did you study at Brown?

23 A. Economic History.

24 Q. And then what is your Ph.D. in from Oxford?

25 A. Economics.

Hausman - direct

1 Q. You said that you got a Marshall Scholarship. What
2 is that?

3 A. This is a competition in which they award about 25
4 scholarships nationwide to pay for graduate school in
5 England.

6 Q. And how did you get that?

7 A. Oh, I entered the competition and won.

8 Q. What did you do after you got your Ph.D.?

9 A. Well, I went to MIT, which is on the right-hand side.
10 And as you can see, I have been there since 1972. So
11 46 years.

12 Q. And what do you do an MIT?

13 A. Well, I stopped teaching about a year and-a-half ago,
14 but I do Ph.D. and undergraduate supervision for courses and
15 for research and Ph.Ds, and then I continue to do my own
16 research.

17 Q. Do you do any work besides your work at MIT?

18 A. Yes, I also do consulting work.

19 Q. What is the nature of the consulting work that you
20 do?

21 A. Well, the ones mentioned here are, I've been involved
22 in patent licensing since the late 1980s for many, many
23 companies.

24 I also have been involved in patent portfolio
25 valuation. Sometimes companies want to sell or buy a patent

Hausman - direct

1 portfolios.

2 And, lastly, I've been involved in litigation.

3 Q. About how many times have you consulted for
4 corporations regarding licensing?

5 A. Oh, I would say maybe 50 times altogether.

6 Q. And then you also mentioned you do some litigation
7 consulting work. Is that where you provided expert
8 testimony?

9 A. Yes.

10 Q. And are those in patent cases?

11 A. Part in patent cases but also in other types of cases
12 also.

13 Q. For how many patent cases have you served as an
14 expert in terms of patent cases?

15 A. In terms of patent cases, probably 25 times, let's
16 say.

17 Q. In those instances, were you serving as an expert on
18 patent damages?

19 A. Yes, I worked for both plaintiffs and defendants.

20 Q. Let's take a look at the next slide.

21 Throughout the course, have you received any
22 awards?

23 A. Yes. So the first one is the John Bates Clark award
24 which is given for the best economist under the age of 40,
25 at which point I always say I wish I was still under 40 but

Hausman - direct

1 that has come and gone.

2 I won the award for the International
3 Econometric Society for the best paper.

4 The American Economic Association is an
5 association of all U.S. and pretty much worldwide
6 economists. I was a distinguished fellow.

7 And I have honorary degrees from places like the
8 universities in China and Thailand.

9 Q. Let's go to the next slide.

10 Have you publish your work, Mr. Hausman?

11 A. Yes, I published probably 200 publications, including
12 150 research papers.

13 Publications on patent damages and patent
14 licensing.

15 And I've been an editor, associate editor of
16 leading economic journals.

17 Q. Have you authored any books?

18 A. Yes, there are five books listed here. I published
19 those books. I was an editor and author of each journal.

20 MS. STEMLER: Your Honor, I offer Professor
21 Hausman as expert on patent damages.

22 MS. SHAMILOV: No objection.

23 THE COURT: He is so recognized.

24 BY MS. STEMLER:

25 Q. So let's talk about your assignment in this case.

Hausman - direct

1 What were you asked to do?

2 A. I was asked to determine how much Groupon would pay
3 IBM to compensation IBM for infringement of the
4 patents-in-suit.

5 Q. What did you conclude?

6 A. I concluded that Groupon would pay IBM no less than a
7 reasonable royalty, which in this case is \$166 million, for
8 the damages period through trial.

9 Q. How many years does your reasonable royalty cover?

10 A. It's about eight years or about eight and-a-half now,
11 I guess.

12 Q. So I'd like to talk about how you reached that
13 number.

14 A. Sure.

15 Q. So you mentioned the phrase "reasonable royalty."
16 What does that mean?

17 A. Well, a reasonable royalty is the amount that has
18 been determined as I understand it by courts, which is to
19 say that if a patent is valid and infringed, the company is
20 using it would pay no less than a reasonable royalty. Of
21 course, we're going to talk about how I get there.

22 Q. Okay. Great. Before we get into that, let's take a
23 look at the next slide.

24 Can you please tell us about some of the
25 materials that you reviewed in preparing for this?

Hausman - direct

1 A. Yes. I looked at a lot of documents, both IBM and
2 Groupon.

3 I looked at deposition transcripts of IBM and
4 Groupon employees, like Mr. McBride who just testified.

5 I had conversations with IBM's technical expert.
6 That's Professor Schmidt who is in the courtroom today and
7 testified I guess yesterday.

8 I had conversations with IBM's licensing
9 executive. That's Mr. McBride.

10 I read expert reports and then I also utilized a
11 survey by Professor Stewart.

12 Q. So let's start with the documents. What kind of
13 documents did you review in this case?

14 A. I looked at all the licenses involved in the case.

15 I looked at financial data for Groupon.

16 I looked at documents showing the value of the
17 patented features.

18 Public information showing benefit.

19 Q. You also said that you reviewed deposition
20 transcripts. Whose deposition transcripts did you view?

21 A. I looked at IBM licensing business and success of
22 licensing the patents.

23 And then Groupon, I looked at the depositions of
24 a number of people in Groupon's management such as financial
25 management and people in charge of operating the business.

Hausman - direct

1 Q. The next bullet point is the conversations with IBM's
2 technical expert. What did you talk to Dr. Schmidt about?

3 A. Well, Professor Schmidt and I talked about the
4 benefits of the patented technologies. You know, he is an
5 engineer. At this point, I always say I teach at MIT but
6 I'm not an engineer: So I depend on people like Professor
7 Schmidt.

8 We also talked about Groupon's use of the
9 patented technologies.

10 And last point is it's his view there were no
11 noninfringing alternatives.

12 Q. And just generally, what are noninfringing
13 alternatives?

14 A. Noninfringing alternatives mean there is another way
15 to accomplish what the patents allow you to accomplish
16 without using the patents so you wouldn't infringe them.

17 Q. Okay. We'll talk more about that a little bit later.

18 Going to the next slide. Slide 10.

19 You also said you spoke to Mr. McBride who just
20 testified. What did you talk to him about?

21 A. He talked about some of this in his testimony this
22 morning, but IBM's licensing practices.

23 How they measure the term of patent licenses.

24 How they value patent portfolios of people and
25 their licenses, and also the licenses of people they license

Hausman - direct

1 with.

2 And discounts IBM gives to its licensees.

3 Q. I'm moving to the next slide.

4 You also mentioned you looked at some expert
5 reports. Which reports did you review in this case.

6 A. I looked at Professor Schmidt's, and then I looked at
7 Mr. Malackowski, who is going to be the damages witness for
8 Groupon.

9 Q. And then you mentioned that you also reviewed a
10 survey. What survey did you review?

11 A. Yes. This is a survey from Professor Stewart, and it
12 looks at how people use the World Wide Web.

13 Q. So between reviewing those materials and having those
14 conversations and reading the deposition transcripts and
15 preparing your opinions, how much time have you spent?

16 A. Well over 100 hours. I don't know exactly but I'm
17 sure it's over 100 hours.

18 Q. Are you being compensated for your work and analysis
19 here?

20 A. Yes.

21 Q. What is your hourly rate?

22 A. \$1,400 per hour.

23 Q. Is that the rate you charged all your clients?

24 A. Yes.

25 Q. Okay. Let's take a closer look at all your opinions.

Hausman - direct

1 So the title of this slide is: License
2 Agreement Arising From the Hypothetical Negotiation. What
3 is a hypothetical negotiation?

4 A. Well, again, the courts have determined that this
5 reasonable royalty I'm going to talk about will arise from a
6 hypothetical negotiation between IBM who owns the patents
7 and Groupon who uses the patents.

8 Q. Why do you use that to analyze patent damages?

9 A. Well, that is how the courts have set up the
10 framework to do it over time.

11 Q. So looking at slide 12, can you please walk the jury
12 through the terms that are on this slide?

13 A. Yes. So IBM owns the patents and Groupon uses the
14 patents. So one thing you want to do is look at the scope,
15 and the scope is a nonexclusive license to the four
16 patents-in-suit.

17 All that means is, as you just heard, IBM has
18 licensed to Amazon, Google, Twitter, and so on, so it's
19 going to be a nonexclusive license, which means that Groupon
20 gets to use them but not exclusively, so do a lot of other
21 companies, and then for the duration, for the length of the
22 patents. And two of the patents have already expired but
23 the '346 patent won't expire until 2028.

24 Q. Turning to slide 15. What are we showing here?

25 A. Well, this is hypothetical negotiation which is used

Hausman - direct

1 to determine damages, estimate damages. And there is some
2 assumptions which the courts have set up.

3 The first is that the patents-in-suit are valid
4 and infringed. So that is very important. For this
5 hypothetical negotiation, there is no disagreement, no
6 uncertainty about whether the patents are valid, when means
7 they're good patents, and whether Groupon infringes them.
8 That is an assumption the courts tell you to make.

9 Next, IBM is a willing licensor.

10 Groupon is a willing licensee.

11 And the parties have access to equal
12 information.

13 Q. And did you make those assumptions for your analysis
14 in this case?

15 A. Yes.

16 Q. Now, at the bottom of the slide on the table, there
17 are some miniature patents and dates. Can you tell me what
18 those are?

19 A. Yes. The top three patents, the hypothetical
20 negotiation will take place in 2008. That's when Groupon
21 first started to infringe the patents.

22 Q. And what month would that be?

23 A. Excuse me?

24 Q. What month would that be?

25 A. I think it's November. Oh, it's November 2008 /it

Hausman - direct

1 says right there.

2 And then for the patent on the bottom, the '346,
3 that was mid-2011. That is when Groupon was starting to use
4 the patents.

5 Q. So Professor Hausman, once you identified the timing
6 and the parties to the hypothetical negotiation, what is the
7 next step in your analysis?

8 A. Well, you start to look at what are called the
9 *Georgia-Pacific* factors. And these are 15 factors which the
10 courts have determined should be used or can be used to
11 guide the analysis.

12 Q. Are the *Georgia-Pacific* factors the ones that we see
13 here on slide 17?

14 A. Yes.

15 Q. Which of the *Georgia-Pacific* factors did you consider
16 for this case?

17 A. I considered all 15 because that is what you are
18 supposed to do.

19 Q. Turning to slide 18. What are you showing here?

20 A. Well, these are six of the 15 factors which have a
21 neutral impact. So that means it doesn't cause a reasonable
22 royalty to be either higher or lower.

23 Q. And on slide 19, what are you showing?

24 A. These are factors 4 and 5, which I will discuss,
25 which create downward pressure on the reasonable royalty.

Hausman - direct

1 Q. And then finally on slide 19, what do we see here?

2 A. These are six factors which again we'll discuss which
3 place upward pressure on a reasonable royalty.

4 Q. So let's talk first about the factors that you said
5 place downward pressure? Turning to slide 21.

6 What is Factor No. 4 looking at?

7 A. The licensor's -- that is IBM here -- established
8 policy.

9 Q. Could you walk us through the analysis you did for
10 Factor 4?

11 A. Sure. Well, IBM has an extensive licensing practice.
12 You heard that from Mr. McBride IBM's patents are valuable
13 assets that invest about \$5.6 billion per year in R&D.

14 Then IBM expects a reasonable return on its
15 investment. So if you're going to spend \$5 billion a year,
16 which is real money, to quote a famous statement in
17 Congress, you've got to get some return on it. Otherwise,
18 you won't spend the money. I mean it's not only for IBM,
19 it's for all companies in the world. You know, people who
20 have invested in new cellphones, again, expect to get a
21 return on their investment.

22 So that's what is going on here. IMB has spent
23 billions of dollars a year. It uses its technology for
24 itself but it also wants to license it to get a return.
25 So, you know, what the bottom line says is that they

Hausman - direct

1 expect to receive a royalty that reflects the value of the
2 patents-in-suit.

3 So as an economist, I want to explain this to
4 the jury. A patent is property, just like if I owned a
5 building here in Downtown Wilmington. And if somebody wants
6 to use that building, they're going to pay me rent. And a
7 royalty is like paying rent to use a patent. You don't
8 expect to use that building for free. And you shouldn't
9 expect, by and large, to use a patent for free. You know,
10 you've got to pay for it. That is how life works. At least
11 to an economist, that is how life works.

12 Q. Now, Professor Hausman, you heard Mr. McBride earlier
13 testify about some cross-licenses. Did you review the IBM
14 cross-licenses in this case?

15 A. Yes, I reviewed them all.

16 Q. Did you analyze those cross-licenses?

17 A. I did.

18 Q. Turning to slide 22. What conclusions did you draw
19 from your review of those cross-licenses?

20 A. Well, as was discussed, there are dozens of
21 companies that have taken a license. They're broad
22 portfolio cross-licenses, and IBM receives value in return
23 from licenses, freedom to operate.

24 And, again, I'd like to emphasize this point. I
25 have worked for tech companies throughout the world. Most

Hausman - direct

1 of the people, I expect all of you probably all own a PC or
2 a Mac, and a chip that goes into those, the main chip is by
3 Intel. I consulted for Intel for years. And I pretty much
4 consulted for all the major cellular companies in the world,
5 and they all want freedom to operate. In other words, you
6 don't want to come out with a new PC and then somebody turns
7 around and says I'm going to sue and stop you from selling
8 that. You have invested tens of millions of dollars.

9 So this freedom to operate this isn't just IBM,
10 every big tech company I've worked for in the world, whether
11 it is computers, cellular et cetera, software, they all want
12 this freedom to operate. It's absolutely crucial because
13 after you invested the tens, sometimes hundreds of millions
14 of dollars, you don't want someone showing up and saying you
15 have to stop selling that unless you pay me a heck of a lot
16 of money to use my patent. That is called patent holdup,
17 and there are hundreds of economic papers written on that.

18 Q. Now, Professor Hausman, did you use any of these
19 cross licenses that you told us about as a benchmark for
20 your reasonable royalty in this case?

21 A. No, because mainly you have to value the cross
22 licenses which is very difficult to do. And secondly, those
23 cross licenses, there is no assumption of validity
24 infringement, so there is a lot of uncertainty typically
25 about some of the patents.

Hausman - direct

1 But here remember back a couple slides ago for
2 the hypothetical negotiation, the assumption is validity and
3 infringement, so these cross licenses had this different
4 assumption which can be quite important.

5 THE COURT: Ms. Stempler, we have to take a
6 break for a lunch.

7 Ladies and gentlemen of the jury, I don't think
8 your lunch is here just yet. I have been assured it is on
9 its way. You should see it soon. I will not be able to
10 start up again until at least 12:45, so you'll have plenty
11 of time to eat. No talking about the case during the break
12 and we'll see you soon.

13 (Jury exited the courtroom at 12:01 p.m.)

14 THE COURT: All right. We'll check in with you
15 as soon as I'm ready to go.

16 We'll take a recess.

17 (A luncheon recess was taken.)

18 THE COURT: We'll bring the jury back in.

19 (Jury entering the courtroom at 1:00 p.m.)

20 THE COURT: Good afternoon everyone. I hope
21 lunch went well. Before we get started, I understand we
22 have more photos of more witnesses for your binders, so I'll
23 have Ms. Ghione pass those out to you.

24 Good afternoon, Mr. Hausman. Welcome back.

25 Ms. Stempler, whenever you're ready, you may

Hausman - direct

1 proceed.

2 MS. STEPLER: Thank you, Your Honor.

3 BY MS. STEPLER:

4 Q. Welcome back from lunch, Professor Hausman.

5 A. Thank you.

6 Q. So, let's start up again at slide 22, we were
7 discussing factor four and we were talking about the IBM
8 cross licenses. Can you remind us why you did not consider
9 them as a benchmark or did not use them as a benchmark in
10 this case?

11 A. Yes. Two reasons, main reasons. The first is there
12 are -- they typically have cross licenses and IBM has a
13 policy of wanting freedom to operate and I tried to explain
14 why that is so important for technology companies for the
15 jury before lunch. And often times, for instance with
16 Google, IBM got to use I think it's like 28,000 patents, and
17 so to be able to value what those patents are worth, which
18 are worth a lot to IBM because IBM --

19 THE COURT: I'm sorry to interrupt you. This is
20 my fault. Do all the jurors have the same photos? You're
21 good? All right. I'm sorry about that. We're all good.
22 Go ahead.

23 A. One of IBM's big services is providing computing
24 power on the cloud, that's up there instead of having tens
25 or hundreds of servers, people have things in the cloud that

Hausman - direct

1 do the computing now. The biggest cloud company in the
2 world is Amazon. Amazon is just not out there selling
3 batteries to me or whatever, they're the biggest provider of
4 cloud service. So IBM needs to be able to use those Amazon
5 patents to be able to compete in the cloud. The question is
6 how do you place a value on that? So that's one reason.

7 And then a second reason which says here the
8 last point there is, they were all done, you know, without
9 litigation, so there is no assumption of validity and
10 infringement. And here, there was some uncertainty about
11 whether they are good patents that were being infringed.

12 Here if you remember before lunch we were
13 talking about the hypothetical negotiation. The court tells
14 me to assume that the patents are valid and infringed so
15 there is no uncertainty.

16 Q. Does that mean when we look at the license payments
17 that the IBM licensees made to IBM that's not really telling
18 the whole story?

19 A. It's not telling the whole story by far because this
20 freedom to operate thing in my experience as I tried to
21 explain before lunch is really very important.

22 Q. What did you conclude about the impact of factor four
23 on the reasonable royalty?

24 A. Well, I concluded this would lead to some downward
25 pressure on the royalty rate, reasonable royalty because

Hausman - direct

1 IBM, some companies often times pharmaceutical companies,
2 they won't license to anybody, they just want to do the drug
3 and not have any competition. But as Mr. McBride describes,
4 IBM wants a license to get some of its \$5 billion a year
5 back, that means that they're willing to license, that leads
6 to lower price.

7 Q. Let's take a look at factor five on the next slide.
8 What are you showing here?

9 A. This is commercial relationship between the parties.
10 And on the left we have IBM, computing hardware, software,
11 cognitive solutions, things like artificial intelligence
12 which is becoming more and more important in the cloud which
13 I just described. And then on the right we have Groupon and
14 they have online customers selling discounted goods and
15 services. They don't really compete with each other at all
16 and because they don't compete with each other that's going
17 to lead a lower reasonable royalty. If you're competing
18 with somebody you're not going to give them as good a deal
19 as if you're not competing with them.

20 Q. I want to move on with the factors that place upward
21 pressure, before we do, to give some helpful context, let's
22 take a look at the next slide. What are you showing here,
23 Professor Hausman?

24 A. I'm trying to explain symbolically how Groupon works.
25 On the left of the screen you will see they are merchants.

Hausman - direct

1 Those are people selling pizza as you see in the middle.
2 There are people selling merchandise like batteries. And
3 there are people that provide services like massages or
4 personal training. And there are hotels. And they want to
5 sell to people on the right, the consumer, that's me and
6 you. They would like us to use some of our hard earned
7 money to buy this stuff so they can make money. That's what
8 the economy is all about.

9 So Groupon is in the middle and they provide
10 these discounted deals, you know, to go to a hotel in New
11 Hampshire, that's close to Boston, you know, you get 30
12 percent off or 50 percent off. And Groupon takes a cut of
13 that amount that I pay and that's how they make their
14 profit. So this is how it all works.

15 In the middle, you have here, you have a
16 computer screen that could be your PC at home, but actually
17 more and more of Groupon's business now, the latest data
18 that they put on the web says that 72 percent of their
19 business is mobile. So actually what's going on, everybody
20 has one of these, it's my iPhone, you might have Samsung or
21 LG, but everybody has a smart phone now. 72 percent of the
22 business comes from people shopping on mobile devices, most
23 often smart phones.

24 So it's still similar, I get on, you know, I get
25 home from work in Boston, my wife and I, I decide I don't

Hausman - direct

1 want to cook, she decides she doesn't want to cook, I get on
2 and say there is a good deal at a restaurant in the
3 neighborhood. We get a good deal, discount, maybe we'll go.
4 That's how it work.

5 Q. Does Groupon makes the goods that are sold on its
6 platform?

7 A. No.

8 Q. Let's go back to the factors that you said place
9 upward pressure, starting with slide 26. What did you
10 consider for factor six?

11 A. This is whether the patents-in-suit generate sales of
12 other products and services, here for Groupon.

13 Q. And what did you consider in your analysis of this
14 factor?

15 A. They had this payment processing system which in
16 longer exist, but they had it for a considerable amount of
17 time during the period, and you can see that it led to \$13
18 million in revenue. It was basically a payment processing
19 system that other merchants could use.

20 Q. What about on the next line?

21 A. The ads, they put ads on their websites and what you
22 do is you click on them, pretty much like Google, it's
23 called a hyperlink, you probably heard about that before.
24 And you go to the ad site, you go to the third-party website
25 and you might decide to buy something there, so that led to

Hausman - direct

1 \$30 million in revenue.

2 And then lastly, we had coupon commissions, so
3 this leads customers to third-party websites offering the
4 coupons. It could be restaurants or various other things
5 and you can see this led to over a hundred million dollars.
6 What this says is there was a lot of other revenue generated
7 by the patents-in-suit beyond what Groupon basically sells.

8 Q. Just to be clear, Professor Hausman, is the revenue
9 from Breadcrumb and the third-party website ads and the
10 coupon commissions separate and apart from the accused
11 revenues in this case?

12 A. Yes, it's separate.

13 Q. And what did you consider, what did you conclude from
14 analyzing factor number six?

15 A. This would lead with other things equal to a higher
16 reasonable royalty.

17 Q. Let's take a look at factor number eight. What does
18 that look at?

19 A. Well, this looks at profitability and commercial
20 success of the accused products. So Groupon has been a
21 pretty successful company, and the accused products are
22 quite successful. Groupon is a leader in online commerce,
23 for local online customers, I would say they're number one.
24 But for local restaurants around where I live around here,
25 they're probably number one. And then lastly you look at

Hausman - direct

1 the revenues and profits generated by the accused products.
2 And all of these lead to a somewhat upward pressure on the
3 reasonable royalty.

4 Q. On that last point, what data did you use for the
5 revenue and the profits?

6 A. I used Groupon's accounting data that they generate
7 and they have to file with the federal government.

8 Q. Looking at the next slide, what are PX numbers 168
9 through 171, 173, 375 through 378, and 1565 through 1568?

10 A. These are shown to be the accounting records, but
11 actually it's all spreadsheets nowadays. That's how you get
12 it. These are the data that you used to look at things like
13 the income and the profits and all that type of stuff. The
14 one on the far right I excluded, that's a company they
15 purchased called Living Social.

16 MS. STEMLER: Your Honor, I offer those
17 exhibits.

18 MS. SHAMILOV: No objection.

19 THE COURT: These are all admitted.

20 (The above exhibits were admitted.)

21 BY MS. STEMLER:

22 Q. Can you explain how you calculated revenue using
23 those spreadsheets that we just saw?

24 A. Yeah. I got the sales data, people who work with me
25 put it into a computer and the damage period in this case

Hausman - direct

1 for legal reasons is defined as starting in 2010 and we
2 looked at the detailed income statements through 2016 and
3 these are the numbers that correspond to the data that I
4 used.

5 And then for 2017 and 2018, we again got
6 detailed income statements and these are the categories that
7 I looked at.

8 Q. You also said that you used financial data from
9 Groupon to look at their profits; is that right?

10 A. Yes.

11 Q. Have the accused products been profitable for
12 Groupon?

13 A. Well, in terms -- there are two major measures. The
14 measure that they primarily use for investment analysis that
15 they put on their website, they have been profitable pretty
16 much for the last five or six years, it's called adjusted
17 EBITDA. There is another often used measure called
18 operating profits, that they have not been profitable on
19 until the last year or so. But their management favors and
20 uses extensively adjusted EBITDA so that's what I'm going to
21 use.

22 Q. So let's talk a little bit about those two things in
23 detail on slide 30. First, what is EBITDA?

24 A. EBITDA is one of these acronyms which stands for
25 earnings before interest, taxes depreciation and

Hausman - direct

1 amortization, that's where the E B, or earnings before and I
2 T D A is interest, taxes, depreciation and amortization.

3 Q. What is depreciation and amortization?

4 A. Depreciation is mainly an accounting convention.

5 Let's say I am running a company and I am buying a computer,
6 the federal government on my income tax statements if I'm a
7 company, even for individuals who have a company, you're not
8 allowed to deduct the money right away. You deduct it over
9 five years. So depreciation, you're not actually paying any
10 cash out, it's an accounting convention actually the
11 Internal Revenue Service uses. I think it has real
12 problems. I don't think the government has kept up with,
13 you know, computer. Companies don't keep computers by and
14 large for five years, maybe two years nowadays. It has a
15 lot of other problems. I have written a number of academic
16 papers and a number of other academics have also written
17 papers on this. I don't think it's very good for what it
18 does, but EBITDA doesn't take it into account.

19 Q. You said that the measure that you were looking at
20 was adjusted EBITDA. Can you explain the difference?

21 A. So EBITDA doesn't use interest, taxes, depreciation
22 and amortization, but adjusted EBITDA, different companies
23 have different definitions of the adjustments but the two
24 main adjustments that Groupon makes is it doesn't use stock
25 based compensation so if you work for a company, you often

Hausman - direct

1 get stock options, if the price goes up, you can cash it in.
2 But the company isn't actually paying any cash out for
3 those, so they exclude those.

4 And then they exclude acquisition related
5 expenses. Remember I mention about acquisition, so those
6 would be excluded as well. I'm using the exact definition
7 that Groupon management uses.

8 Q. You also mentioned operating income. What is
9 operating income?

10 A. I didn't hear, I'm sorry.

11 Q. You also mentioned operating income. What is
12 operating income?

13 A. Operating income basically includes all these in that
14 EBITDA excludes and says, you know, is my income, also
15 called profit, greater or less than zero, so that's often
16 used, too.

17 Q. Let's take a look at the next slide. Why did you use
18 adjusted EBITDA in this case?

19 A. Well, two reasons. The first is, Groupon's manager,
20 such as Mr. Schmitz whose picture is here, they say they use
21 it, and they explain why, it's also explained in the
22 documents. On the right, you'll see that every company has
23 to file reports with the SEC, so that's the Securities and
24 Exchange Commission, that's Washington, you got to explain
25 what you're doing.

Hausman - direct

1 And in their annual reports, the 10(k)s, they
2 say we find adjusted EBITDA to be best. They also report
3 operating income, you have to, but they explain why they
4 think adjusted EBITDA is the best measure to use.

5 Q. Let's take a look what they say. On slide 33, what
6 did you learn from Mr. Schmitz's testimony?

7 A. As you see highlighted in yellow, he says for
8 adjusted EBITDA, it's a better measure of cash
9 profitability. Then at the bottom, he says it's a better
10 way to understand the core operational results distinguished
11 from any depreciation and amortization as well as SBC, which
12 are noncash measures.

13 So what he's saying here is that he and the
14 other management at Groupon thinks you should emphasize
15 what's happening, you know, with cash profitability and
16 leave these things like depreciation and amortization on the
17 shelf as it were and not use it.

18 Q. Professor Hausman, can you please turn to Plaintiff's
19 Exhibit 371 in your binder. Let me know when you're there.
20 It's in volume one.

21 A. You said 371?

22 Q. Yes.

23 A. Yes, I'm there.

24 Q. What is this document?

25 A. Well, what this is, this is their SEC filing, the

Hausman - direct

1 10(k), which is their annual report.

2 MS. STEMLER: Your Honor, I offer Plaintiff's
3 Exhibit 371.

4 MS. SHAMILOV: No objection.

5 THE COURT: It's admitted.

6 (Plaintiff's Exhibit 371 was admitted.)

7 BY MS. STEMLER:

8 Q. Now, Professor Hausman, you were saying that you
9 looked at the SEC filings. Is this one of the SEC filings
10 that you used to understand Groupon's preference for
11 adjusted EBITDA?

12 A. The annual report or 10(k) is one of the most
13 important documents that companies file each year with the
14 government.

15 Q. If you can please turn to the page that's marked
16 group 0024096. What is this section of Groupon's annual
17 report addressing at the bottom there?

18 A. They're talking about adjusted EBITDA. They say the
19 top, it's a non-GAAP measure where GAAP is generally
20 accepted accounting principles. They're saying that they
21 think this is better.

22 Q. Can you please read the relevant portion of the
23 excerpt for the jury?

24 A. Sure. What this say, Groupon is saying we exclude
25 depreciation and amortization because it's noncash in

Hausman - direct

1 nature, and we believe that non-GAAP financial measures
2 excluding these items provide meaningfully supplemental
3 information about our operation performance and liquidity.

4 Our definition of adjusted EBITDA may differ
5 from similar measures used by other companies even when
6 similar terms are used to identify such measures. Adjusted
7 EBITDA is a key measure used by our management and board of
8 directors to evaluate operating performance, generate future
9 operating plans and make strategic decisions for allocation
10 of capital. Accordingly, we believe that adjusted EBITDA
11 provides useful information to investors and others in
12 understanding and evaluating our operating results in the
13 same manner as our management and board of directors.

14 Q. And, Professor Hausman, is Groupon still making
15 those statements about EBITDA today?

16 A. Yes. If you look on their website, the most recent
17 investor presentation they made in May of this year, they're
18 using adjusted EBITDA along with gross profits and free
19 cash flow, and in the main body of it, they don't mention
20 operating income at all.

21 Q. So, Professor Hausman, what did you conclude about
22 your analysis of Factor 8 in the case?

23 A. Well, they had been mainly profitable based on
24 adjusted EBITDA, so this is going to lead to a higher
25 reasonable royalty.

Hausman - direct

1 Q. So let's move on to the next two factors, 9 and 10.
2 What do those address?

3 A. Well, these are advantages and benefits of the
4 patents-in-suit.

5 Q. And why did you consider them together?

6 A. Well, as an economist, I think the two go together.
7 If you get benefits from something, it's usually because it
8 gives you an advantage. You know, it makes sense to me
9 anyway.

10 Q. What is your evidence for the benefits and advantages
11 of the patent?

12 A. Well, conversations with Professor Schmidt who
13 testified yesterday and reading his report.

14 I looked at Groupon documents. I looked at
15 deposition testimony.

16 And, Dr. Stewart or Professor Stewart's survey
17 of online shoppers.

18 Q. Okay. So let's talk about those benefits and
19 advantages for each of the patents. And let start with the
20 Filepp patent.

21 What is your understanding, Professor Hausman,
22 of the benefits of the Filepp patent?

23 A. Well it reduces the burden on the network.

24 It reduces usage of bandwidth. And,

25 It combats network bottleneck.

Hausman - direct

1 So what this all leads to is the accused
2 products experience faster load times.

3 So most people don't like to be sitting there in
4 front of their PC or on their cellphone waiting for the page
5 to load. And if it takes a long time, a lot people just
6 give up. If I am on Groupon and it takes a long time, I say
7 the heck with it, I'm going to Amazon. It's just as easy.

8 And this is known throughout the industry. It's
9 not just Groupon, you know, that this is important for. But
10 companies like Amazon, Google, many other companies I've
11 consulted for all agree with this point.

12 Q. Did you see any Groupon documents that confirm your
13 understanding of how the patents benefit the accused
14 product?

15 A. Yes.

16 Q. Can you please turn to Plaintiff's Exhibit 120 in
17 your binder?

18 A. Okay. I'm there.

19 Q. What is that exhibit?

20 A. Well, this is a document entitled Latency, Why Should
21 We Care.

22 Q. Okay. Hold on one second, Professor Hausman.

23 MS. STEMLER: Your Honor, I offer Plaintiff's
24 Exhibit 120.

25 THE WITNESS: Okay.

Hausman - direct

1 MS. SHAMILOV: No objection.

2 THE COURT: Okay. It's admitted.

3 (PX-120 was admitted into evidence.)

4 BY MS. STEMLER:

5 Q. So let's just take a look at this together, Professor
6 Hausman. So can you read the title again for us?

7 A. Yes. Latency, Why Should We Care.

8 Q. And then down at the bottom, there is a section that
9 has an answer to that: Why Care About Latency? Do you see
10 that?

11 A. Yes.

12 Q. And can you read the second and third paragraph from
13 this document?

14 A. Yes. But before I do so, I'd like to explain what
15 latency means to the jury. Maybe they know, maybe they
16 don't know. Latency is how long it takes between when you
17 type a command into a computer and the page loads. So low
18 latency means things happen very quickly. That is what
19 consumers like.

20 So anyway, then it says: Why Care About
21 Latency?

22 In the next-to-last paragraph, it says: In a
23 study by Wal-Mart a couple years ago, it was discovered that
24 the effects of even one slow page in the user experience can
25 cause a major impact. In other words, it does not matter if

Hausman - direct

1 the deal page is fast if even one page in the rest of the
2 flow is slow. In general, buyers were those who experienced
3 pages that were two times faster than those who did not
4 purchase. The slowest page is our weakest link in the
5 purchase chain.

6 This study also showed that slow page speed
7 resulted in even more significant customer impacts than
8 immediate RPV, which is Revenue Per Visit. Perceived lack
9 of quality, anger and frustration with the vendor. It's not
10 just a missed sales opportunity, it is negative consumer
11 impact we risk.

12 So what this is saying is it's just not me that
13 gets frustrated when I'm waiting for the computer to come
14 back with the information but a lot of customers also get
15 frustrated and not only do they leave and you don't get that
16 sale but they have a bad -- you get a bad reputation and
17 they say, well, don't go to Wal-Mart because that was slow
18 the last time. I'm going to Amazon for instance.

19 Q. So how did this influence you about the benefits of
20 the Filepp patents?

21 A. Welt, according to what Professor Schmidt told me and
22 what I read, this faster load time that you get from the two
23 Filepp patents, that says that those are advantages of the
24 patents.

25 Q. If we take a look at the next slide, slide 36.

Hausman - direct

1 Professor Hausman, what are PX-56, 63, 64, 121,
2 379, 638, and 640?

3 A. These are all additional documents which demonstrate
4 the advantages of these two patents in speeding things up.

5 MS. STEMLER: Your Honor, I offer those
6 exhibits.

7 MS. SHAMILOV: No objection, Your Honor.

8 THE COURT: They're all admitted.

9 (Above-referenced exhibits admitted in evidence.)

10 BY MS. STEMLER:

11 Q. Let's go to the next slide.

12 You also mentioned that you reviewed some
13 testimony from Groupon's witnesses. What testimony is shown
14 here?

15 A. Well, this is Mr. Carlisle who is with management for
16 Groupon. And he was asked: Have those badges had a
17 noticeable effect on Groupon's revenue?

18 So what the badges are, when you look at a
19 Groupon deal, oftentimes attached to that deal or that
20 thing on your screen, it will say trending, for instance,
21 you know, which means that a lot of other people are buying
22 it. And these badges, Groupon has found, lead to higher
23 sales revenue, and higher sales revenue, of course, leads to
24 more profit which is what Groupon is in business to do.

25 And he saying, well, look, we're putting -- in

Hausman - direct

1 the middle there: And the reason that they are putting more
2 on there is because they're having a positive impact.

3 Q. Now, was his testimony, some part of his testimony
4 you considered in evaluating the benefits of the '849 patent?

5 A. Yes, this is from his deposition.

6 Q. And how did it influence your analysis of the
7 benefits of the '849 patent?

8 A. Well, again, you know, it's my understanding that
9 the '849 patent has these effects and anything that leads
10 to higher sales and more profit gives a positive impact to
11 Groupon.

12 Q. Now, you mentioned that in addition to talking to
13 Dr. Schmidt, and documents, you also reviewed a survey.
14 What was the survey about?

15 A. Well, Professor Stewart did a survey, and what he
16 wanted to find out was people who were online shopping, you
17 know, if you are on Amazon or if you are on Wal-Mart.com or
18 something like that, how do you do it? How do you use it
19 web?

20 Q. Can you please turn to Plaintiff's Exhibits 549
21 through 557 in your Volume 2 binder.

22 A. Okay. I'm there.

23 Q. And are those the survey results that you looked at?

24 A. Yes.

25 Q. So if you can turn to page 40 of that report.

Hausman - direct

1 A. Yes.

2 Q. And can you explain to us how the results of this
3 survey informed your opinion about the benefits of the
4 Filepp patent?

5 A. Yes. Professor Stewart had a survey of 2,721 people
6 who were using the web. And he wanted to find out what
7 percentage of people disabled the caches, because these
8 patents leave caches. You store the stuff on the computer
9 so you don't -- on your own computer. So what cache means
10 you look at an ad or so. If you want to look at it again
11 rather than having to get it from the server over the
12 telecommunications network again, it will be stored on your
13 computer so you can see it right away. That speeds things
14 up.

15 And so there is a possibility that some people
16 may not use caches. And that little button on your iPad or
17 your iPhone, you can disable caching, you know, if you don't
18 want the computer to store the information for some reason.

19 But what Dr. Stewart or Professor Stewart found
20 is only 1.7 percent disabled them. So that means that a
21 little more than 98 percent of the people are using caches.

22 Q. How did that relate to your understanding of benefits
23 of the Filepp patent?

24 A. Well, since the caching speed things up, it's a
25 benefit. And, of course, if you disable your cache, you are

Hausman - direct

1 not going to get that benefit. But 98 percent of the people
2 are getting the benefit of caches.

3 Q. Now, we talked about the Filepp patents. I want to
4 move on to the '601. Turning to slide 38. What is your
5 understanding of the benefits of the '601 patent?

6 A. Well, this is again from conversations with Professor
7 Schmidt and readings things, but it keeps track of
8 information during a conversation over networks, so it lead
9 to a more seamless user experience. And it has advantages
10 over what are called cookies or HTML forms.

11 Q. And moving on to slide 39. What are you showing
12 here?

13 A. Well, this is Mr. Carlisle again testifying at his
14 deposition. And he says: Groupon -- he is asked a
15 question: Groupon actually found a better user experience
16 if they keep track of user's identities using methods other
17 than just cookies, correct?

18 And he answered yes.

19 Q. And then finally move on to the '346 patent. What is
20 your understanding of the '346, the benefits of the '346
21 patent, Professor?

22 A. Well, this is a patent that allows you to use your
23 Facebook or Google credentials to create a new account, user
24 name and password. So it's an automatic creation of the
25 account, and makes it much easier to start a new account and

Hausman - direct

1 then when you log in, it's much easier as well. Mainly, you
2 don't have to create a new user name and remember a new
3 password.

4 So I have so many passwords, I can barely
5 remember them anymore. So anything that saves me from not
6 having to remember yet another one is good for me and it's
7 good for most users of the Internet.

8 Q. And why is that significant to your analysis here?

9 A. Well, because this is the benefits of the '346
10 patent. And there are documents from Groupon this leads to
11 more sales and more profit. So that is a benefit that is
12 going to lead to a higher royalty.

13 Q. So let's look at one of those documents. Can you
14 turn to Plaintiff's Exhibit 85 in your binder?

15 A. Okay. I'm there.

16 Q. And what is this document?

17 A. This is a document, a Groupon document. And it's
18 talking about the advantages, and it says: Logged in users
19 have a higher purchase rate compared to those who are not
20 logged in.

21 MS. STEPLER: Hold on one second, Professor
22 Hausman.

23 THE WITNESS: I'm sorry.

24 MS. STEPLER: We're going to look at it
25 together.

Hausman - direct

1 Your Honor, I offer Plaintiff's Exhibit 85.

2 MS. SHAMILOV: No objection.

3 THE COURT: It's admitted.

4 (PX-85 was admitted into evidence.)

5 BY MS. STEMLER:

6 Q. Okay. So let us catch up to you.

7 A. Okay. Sorry. This is what my students always say.

8 I go too fast. I apologize.

9 Q. So what is the title of this document?

10 A. Login/signup prompts.

11 Q. And can you continue? Read from where you started
12 before, please.

13 A. Sure. It says: Logged in users have a higher
14 purchase rate compared to those who are not logged in (+2x).
15 They also get personalized list of deals such as recently
16 viewed deals, customers also viewed, and are more engaged.
17 This has been the motivation for us to give a user multiple
18 touch points and ways (Facebook login/Google login) to log
19 into/signup with Groupon.

20 Q. Thank you. So how does that inform your opinion
21 about the benefits of the '346 pant?

22 A. Well, again, I'll talk my personal experience, but if
23 I am on my iPhone, which I just showed the jury, and
24 somebody asked me to buy them something, I have a problem
25 which is known in the industry as fat fingers. My fingers

Hausman - direct

1 actually aren't that fat, but so somehow when I try to type
2 on the little keys on my iPhone, I end up getting some wrong
3 letters or wrong numbers, and that says you made a mistake.
4 You've got to do it again.

5 So I always give them two tries, not three
6 tries. Three strikes and you are out. Two tries. If I
7 don't get it by the second try, I'm out of there.

8 So what this does is it stops the fat fingers
9 problem. I just say login using my Google account and it
10 works the first time.

11 So what Groupon and many other companies have
12 found, people who are logged in that way, they had no
13 problem buying. What you want to do, if you are a company
14 like this, is make it as easy as possible for people to buy.
15 So, again, it lead to greater sales and more profit.

16 Q. Looking at the next slide, 42. What testimony did
17 you review to inform your opinion about the benefits?

18 A. Well, this is Mr. Carlisle's deposition. Remember,
19 he is management of Groupon, and he says: We want to make
20 the signup process easy for customers.

21 That's what I was talking about.

22 And he also said: To improve the convenience
23 for customers who wanted to log in that way.

24 Q. And on the next slide, what are you showing here?

25 A. This is Mr. Dunham, who is another management person.

Hausman - direct

1 He is in marketing and at Groupon. And he says: It is a
2 way to make it easier to create a user account, yes.

3 Q. Moving on to slide 44.

4 Professor Hausman, what are Plaintiff's Exhibits
5 605, 56, 114 through 116, 595, 602, 603, 606, 612, 619, and
6 620?

7 A. These are all additional documents that talk about
8 the benefits of the '346 patent.

9 Q. And did you rely on those documents to analyze
10 benefits of the '346 patent?

11 A. Yes, I did.

12 MS. STEPLER: Your Honor, I offer those
13 exhibits.

14 THE COURT: Okay.

15 MS. SHAMILOV: No objection.

16 THE COURT: Okay. They're all admitted.

17 (Above-referenced exhibits admitted in evidence.)

18 BY MS. STEPLER:

19 Q. Okay. So we've talked about the benefit of all the
20 patents-in-suit. What conclusions did you draw from your
21 analysis of the benefits, Professor Hausman?

22 A. These lead to higher sales or more profits for
23 Groupon. So they're going to lead or cause upward pressure,
24 holding other things equal for the reasonable royalty.

25 Q. Okay. We have a couple more factors to look at

Hausman - direct

1 before we get to the final hypothetical negotiation. We'll
2 keep marching through.

3 What does Factor 11 look at?

4 A. How do the accused products use the technology of the
5 patents-in-suit.

6 Q. And how did you evaluate Factor 11?

7 A. Well, I depended on Professor Schmidt's analysis,
8 although I really don't think he was using a magnifying
9 glass. Anyway, you know, that is how you guys put it on the
10 slide.

11 And then I also looked at Groupon data.

12 You have been watching too much Sherlock Holmes.

13 Q. All right. Looking at slide 46. What is this slide
14 showing here?

15 A. Well, remember, we were talking about cacheable
16 content before. That is how, what percentage of time
17 caching is used. And so he got some Groupon data and
18 analyzed it, mainly just counting of computer codes, and he
19 found that 59.2 percent was cacheable content.

20 Q. And looking at the next slide, what is this showing
21 here?

22 A. I want to figure out how much the '967 patent is
23 used. And so this is a schematic that I had put together.
24 So on the left, note that it's January 1st, 9:30. So we
25 know what happened the night before.

Hausman - direct

1 But anyway, this person wakes up and gets on
2 Groupon, and she sees pizza. Now, I'm a person who is
3 always ready for a snack, but 9:30 in the morning is too
4 early for pizza, at least in my view. I'm going to guess
5 in her view, too.

6 But later that day after watching football
7 games on TV or whatever, she thinks to herself, hey, I
8 remembered that pizza. It look pretty good. It was a good
9 deal. You could see \$10 off and various things. That is
10 maybe not for pizza. But anyway, it's going to a be good
11 deal for Groupon. Anyway, it says 45 percent off for Jets
12 Pizza.

13 So now she says I'm going to go and I want to
14 buy that pizza. But rather than having to load all the
15 information again, it's in her cache on her computer, she is
16 ready to go. Just one click and then, you know, it comes
17 up and then another click and she can buy it.

18 Q. And what was your understanding about why that was,
19 why that mattered to your analysis?

20 A. Well, because we only -- as I understand it, the '967
21 patent, it's only for people who return and use the contents
22 of the cache. If you have some cache but you don't come
23 back to use it, it doesn't count as it were.

24 Q. And did you calculate the percentage of Groupon users
25 who were returning?

Hausman - direct

1 A. Yes.

2 Q. And how did you do that?

3 A. I took Groupon data and essentially divided the two
4 numbers -- the total people who were using Groupon and
5 returned visitors.

6 Q. Would you please turn to Plaintiff's Exhibit 1010 in
7 Volume No. 2?

8 A. Okay. I'm there.

9 Q. What is this document?

10 A. Well, this is data from 2017 from Groupon. And it's
11 looking at how people use Groupon.

12 MS. STEPLER: Your Honor, I offer Plaintiff's
13 Exhibit 1010.

14 MS. SHAMILOV: No objection, Your Honor.

15 THE COURT: It's admitted.

16 (PX-1010 was admitted into evidence.)

17 BY MS. STEPLER:

18 Q. So, Professor Hausman, is this one of the documents
19 you relied on for your opinion?

20 A. Yes.

21 Q. And what exactly is this document?

22 A. Well, this is looking at how customers use the
23 Groupon websites.

24 Q. Could you turn to page 19 of this document?

25 A. Yes.

Hausman - direct

1 Q. What is that showing there?

2 A. Okay. Well, what is shown is if you look at the
3 vertical columns, you could point to them for the jury,
4 please.

5 Q. Sorry, Professor. Are you talking at the bottom of
6 the panel?

7 A. Yes. So, you know, it's for April 2nd to April 9th
8 and so on. But the ones that are on the vertical axis, you
9 know, the horizontal rows, these are by type of usage.

10 So you can see that App. That means you had
11 people who were using an app on their iPhone or on their
12 Android phone, Samsung, for instance.

13 Touch, that is the website for mobile.

14 And then, lastly, is Web, that is people using
15 PCs basically.

16 And what you can see is you have different
17 abbreviations but you have UV, UDVV, UDV, and Deal Views.
18 And so from that, you can figure out the number of returning
19 users just essentially by dividing. And as I remember, I
20 get about 21 percent. It differs for each of three
21 categories, you know, in yellow there. But they're all
22 right around 21 percent.

23 Q. Thank you. Does this table have the data that you
24 used to determine the percentage of returning visitors?

25 A. Yes.

Hausman - direct

1 Q. Turning back to the slide. Going to slide 48. Is
2 this just a blowup of the table that we just looked at?

3 A. Yes, so UDV stands for Unique Deal Views. That means
4 just once. Deal views is total deal views.

5 So the way you do the arithmetic is you take
6 deal views minus unique deal views, so that turns out to be
7 about 9 million, and then you divide by deal views which is
8 a little more than 45 million. You can see that is going to
9 be around 21 percent. That is how you do the arithmetic.

10 Q. How did you know you should use those metrics?

11 A. This is from discussions with Professor Schmidt.

12 Q. So let's take a look at the next slide.

13 What are Plaintiff's Exhibit 185, 357 through
14 368, and 1009 through 1020?

15 A. Well, these are the documents, you know, for
16 different dates that I used from Groupon to be able to
17 calculate that number. We just looked at one date, April of
18 2017, but I wanted to look throughout the eight-year period.

19 MS. STEPLER: Your Honor, I offer this exhibit.

20 MS. SHAMILOV: No objection.

21 THE COURT: They're all admitted.

22 (The above exhibits were admitted into
23 evidence.)

24 BY MS. STEPLER:

25 Q. Let's look at slide 50, Professor Hausman. What was

Hausman - direct

1 the result of your analysis of the non-unique deal?

2 A. The difference between the three categories, the
3 average they're all pretty close, the average is around 21
4 percent of returning people, those are the non-unique.

5 Q. Let's move on to the '849 patent on slide 51. What
6 are you showing here?

7 A. Well, this is the extent of use which is calculated
8 or estimated by Professor Schmidt and he found that it was
9 59.2 percent for the website and 52.7 percent for the apps.

10 Q. And are these the trending boxes that you were
11 talking about earlier when you were talking about badges?

12 A. Yeah, these are the badges. So, like the one on the
13 right is 50 percent off at Jiffy Lube, getting an oil
14 change, 50 percent off is a good deal. You see that little
15 badge which says trending, that says to consumers this is a
16 really good deal, it's doing very well.

17 Q. Moving to slide 52. Is this the same analysis for
18 the '849 patent that you did for the '967?

19 A. Yes. It's really the same.

20 Q. So you're looking at the percentage of returning
21 visitors?

22 A. Yes.

23 Q. And what was the result of that?

24 A. We can see they're both 21 percent, give or take a
25 little bit.

Hausman - direct

1 Q. Let's move to slide 53. What did you consider for
2 the extent of use of the '601 patent?

3 A. This is again based on discussions with Professor
4 Schmidt. This is a flow for somebody, they launched the
5 page on the web, for instance, and then at the end,
6 hopefully they were making orders, that's how Groupon makes
7 money. So these are the eight steps that take place to buy
8 something.

9 Q. How did you figure out that there were eight steps?

10 A. This is, you know, talking to Professor Schmidt, but
11 also I have used Groupon a number of times.

12 Q. What does the arrow that just popped up there
13 represent?

14 A. Well, this is where Professor Schmidt told me the
15 '601 patent is used, so it's state information embedded in
16 the hyperlink, it's one of the eight steps, so it's just
17 going to be the extent of use is 1/8th, it could be more,
18 but I was trying to be conservative so I used 1/8th.

19 Q. Let's move on to the '346 patent. If you could turn
20 to Plaintiff's Exhibit 46 in your binder, please.

21 A. Okay.

22 Q. And what is that document? What is that document?

23 A. It's called social account creation data.

24 Q. And is this one of the documents you used in your
25 analysis?

Hausman - direct

1 A. Yeah, this is a Groupon document that had data.

2 MS. STEPLER: Your Honor, I offer Exhibit 646.

3 MS. SHAMILOV: No objection.

4 THE COURT: It's admitted.

5 (Exhibit 646 was admitted into evidence.)

6 BY MS. STEPLER:

7 Q. What did you consider to determine the extent of use
8 of the '346 patent?

9 A. I looked at the total accounts and then I looked at
10 the social registrations, those are the registrations using
11 Facebook or Google and I divided it and I got 14 percent.

12 Q. Did you get that data from the document we just
13 looked at, Plaintiff's Exhibit 46?

14 A. Yes.

15 Q. So now that we've covered the extent of use for all
16 the patents-in-suit, can you explain to the jury how your
17 analysis of factor 11 impacted your reasonable royalty
18 opinion?

19 A. Yeah. So I'm going to use this information to
20 apportion or allocate the use of the patents. I'm going to
21 look at Groupon's overall revenue, but I'm going to try to
22 figure out where the patents are used using these data and
23 it's called apportionment.

24 Q. Let's move on to factor 13. What is factor 13
25 considered?

Hausman - direct

1 A. It's a portion of profit credited to the invention,
2 so that first word, portion, just a key part of
3 apportionment, that what you're trying do.

4 Q. What did you take into account for your analysis of
5 factor 13?

6 A. I considered Groupon's revenues and profits of the
7 accused products, the products that are accused of using the
8 patents. I looked at factor eight, the profitability of the
9 accused products, factors nine and ten, these are all the
10 Georgia-Pacific factors, benefits and advantages of the
11 patents-in-suit, and factor 11 the extent of use of the
12 patented technologies.

13 Q. Let take a closer look at your analysis of this
14 factor. Going to slide 56, what were the accused revenues
15 that you started with for the '967 patent?

16 A. There are \$4,169,458,396, this is from as you can see
17 on the slide, March 2010 when the damage period starts up
18 until August of 2015 when the '967 patent expired.

19 Q. I see also in the box next to that date range you
20 have a picture of a laptop and the word website, what were
21 you indicating there?

22 A. That's when the '967 patent was used from discussions
23 with Professor Schmidt, so that's why it's just the website.

24 Q. How were you able to calculate the accused revenues
25 for the website?

Hausman - direct

1 A. Well, this is, you know, a consultation with
2 Professor Schmidt. We looked at the revenue from when the
3 '967 issued and basically added it up using those Groupon
4 accounting documents.

5 Q. And what did you do next to determine the portion of
6 profits that were attributable to the '967 patent?

7 A. Then he multiplied by 59.2 percent, so remember, this
8 is what Professor Schmidt calculated to be the percentage of
9 the cached content.

10 Q. Was this the number that we were just looking at
11 earlier when we were looking at factor 11 of the '967
12 patent?

13 A. Yes, this is Professor Schmidt's calculation.

14 Q. What was the next step that you took?

15 A. Well, the next step I used my calculation which is 21
16 percent returning visitors, so I multiplied 59.2 percent by
17 21 percent, and that is going to tell me the revenue
18 associated with the patent so you can see it's only about 12
19 percent of the original, 16 percent times 20 percent.

20 Q. What was the revenues associated with the '967
21 patent?

22 A. \$517,829,259. So we started off with over 4 billion
23 and now we're down to 517 million.

24 Q. Let's keep going. What was the next step you took?

25 A. Then I used what the profit margin for the adjusted

Hausman - direct

1 EBITDA was for this period, that's the arrow down at the
2 bottom. That's 9.1 percent. And I multiply the 517 million
3 by that. And the profits attributable to the '967 patent
4 are \$47,092,842.

5 Q. Professor Hausman, why did you convert the revenues
6 associated with the '967 patent to profits?

7 A. Well, for companies, profits is the bottom line.
8 Profits are what they use to pay people, but it's also
9 profits determine stock prices. So Groupon, you know, is on
10 the stock market, and everybody wants the stock price to be
11 higher. And, you know, economists will say profits are the
12 bottom line. So that's, you know, the main factor that I
13 would use to figure out what the reasonable royalty is.

14 Q. Now, did you perform these steps that we just walked
15 through of calculating the accused revenue, apportioning for
16 the extent of use and converting the revenues to profits for
17 each of the patents in this case?

18 A. Yeah, I followed the same procedure for all four.

19 Q. Let's take a quick look at the other three. On slide
20 16 you have the '849 patent. What was the accused revenue
21 for that?

22 A. This was the longer period. This goes from March up
23 to the current time, July 24th, even a little ahead of the
24 current time. And the accused revenue here was
25 \$11,144,491,878. So again, I go through the same

Hausman - direct

1 multiplication.

2 Now, if you point to the jury that you'll see
3 the adjusted EBITDA margin is a little bit less, it's 8.9
4 percent that I multiply. And the profits attributable to
5 the '849 patent are \$118,333,137.

6 Q. And moving to slide 61, can you walk us through the
7 same process for the '601 patent?

8 A. Yeah. The '601, note that it ends in 2016. That's
9 when the patent expired. And this is for both websites and
10 apps. On the right you'll see a little smartphone there.
11 So the accused revenue is \$7,609,739,453, and then I divide
12 by eight, which is 12.5 percent, multiply by the profit
13 margin of 8.6 percent, and my estimate of profits is
14 \$81,382,088.

15 Q. And then finally for the '346 patent, will you walk
16 us through your calculation for that?

17 A. Yeah, again that goes up to the current time, July
18 2018. The accused revenue is \$10,180,869,821 multiplied by
19 the 14 percent over that, I got that from the Groupon
20 documents, multiplied by the profit margin of 9.0 percent,
21 and I end up with profits attributable to the '346 patent to
22 \$129,192,866.

23 Q. Now, Professor Hausman, before we move on, does your
24 analysis of factor 13 account for Groupon's contributions to
25 the success of its products?

Hausman - direct

1 A. Yes. Because, you know, I'm using, for instance, 14
2 percent, but the other 86 percent of the profit that's
3 coming from Groupon, and you know, various other people who
4 they're buying services from.

5 Q. Now that we have gone through your analysis for all
6 the four patents for factor 13, what impact did it have on
7 your opinion for reasonable royalty?

8 A. This these are pretty healthy numbers. They're in
9 the millions of dollars. This is going to lead to a higher
10 reasonable royalty.

11 Q. Professor Hausman, we're now ready to talk about that
12 last factor in the negotiation. How did you analyze factor
13 15?

14 A. This is the hypothetical negotiation, so you take the
15 other 14 factors into account, but this is the amount a
16 licensor and a licensee would have agreed upon at the time
17 the infringement began. So here for three of the patents,
18 it's 2008, the other is 2011. And you end up with this
19 hypothetical negotiation, and you try to estimate the best
20 way you can what kind of deal they would have ended up with.

21 Q. Let's talk about that. What steps did you take to
22 analyze the hypothetical negotiation?

23 A. Well, I determined and discussed already the economic
24 benefits associated with each patent, and then the next step
25 is I have to determine how the parties would share that

Hausman - direct

1 economic benefit.

2 Q. So let's walk through how did you that. What was the
3 first thing that you considered?

4 A. Well, there are four patents and remember, a very
5 important assumption is that they're valid and infringed.
6 That's what makes this hypothetical negotiation different
7 from all the other nonlitigation licenses where no one is
8 certain that the patents are valid and infringed. Here the
9 Court tells me, make an assumption, Professor Hausman, or
10 anybody that's going to do the hypothetical negotiation that
11 the patents are valid and infringed so there is no
12 uncertainty on the table.

13 Q. And how much of a factor was this in your analysis in
14 deciding how the parties would share that?

15 A. I think it's quite important because we know the
16 patents are leading to increased profits or associated with
17 increased profits, and you know, the assumption is these are
18 good patents and that Groupon is infringing them.

19 Q. Let's move on to slide 57. Actually before we go
20 there, which party did it benefit, the assumption of
21 validity and infringement?

22 A. It benefits IBM because it removed all uncertainty
23 about the invalidity of the patent and infringement.

24 Q. Looking at slide 67, what was the next item that you
25 considered?

Hausman - direct

1 A. Well, that no one has identified any non-infringing
2 alternatives. There is going to be a dispute about this,
3 there always is in the patent cases. I'm going to give you
4 the economic interpretation.

5 Groupon has known about these patents since
6 basically 2011 or 2012. Remember, non-infringing
7 alternatives is another way to do it, you don't have to pay
8 the patentholder, here IBM. So that's been about seven
9 years from 2011. To an economist it says if there are
10 non-infringing alternatives, you would expect Groupon to
11 have gone and done it.

12 MS. SHAMILOV: Your Honor, may we have a
13 side-bar, please.

14 (Side-bar discussion:)

15 THE COURT: What's the issue?

16 MS. SHAMILOV: What he was just about to say is
17 that because the Groupon did not change the systems since
18 the older of the date someone said there was infringement.
19 That's what he's implying.

20 THE COURT: You think he's going to say that
21 there is infringement in his opinion?

22 MS. SHAMILOV: Well, during the opening
23 statement counsel stated that one of the facts will be is
24 that they didn't change their systems. If it was so easy,
25 they would have changed it, so they did infringe. So this

Hausman - direct

1 is in connection where Dr. Hausman now says to an economist
2 they would have changed it, if it was easy to change, they
3 would have just changed it. It means if they didn't change
4 and knew about the patent, he's implying that there will be
5 infringement.

6 MR. DESMARAIS: That's not what he said.

7 MR. HADDEN: Can I make one other point? Even
8 if he's not saying that, he's saying if there was an
9 alternative that was available, they would have used it.
10 This comes back to the NDA issue where IBM told Groupon you
11 don't need to change what you're doing during this time
12 period, he's now using the fact that they didn't change it
13 as somehow that they couldn't find an otherwise economically
14 viable alternative. They didn't change it because IBM said
15 you don't need to change because we're not asking you to and
16 we're not going to charge you royalties. That's a big
17 issue.

18 MS. STEMLER: This is something that was
19 disclosed and analyzed by Professor Haase, the absence of
20 the non-infringing alternatives. He analyzed it for all
21 patents and he's simply saying if there were non-infringing
22 alternatives, then that would have been taken into account,
23 this is nothing to do with the NDA and for the substantive
24 communications between the parties.

25 THE COURT: Is he going to say anything about

Hausman - direct

1 his view as to whether or not Groupon infringes these
2 patents?

3 MS. STEPLER: No, he's simply making the point
4 that the absence of non-infringing alternatives is an item
5 that favors IBM.

6 THE COURT: Okay.

7 MR. HADDEN: So there is one way you can argue
8 because if there was an economically viable non-infringing
9 alternative that would have been an issue in the
10 hypothetical negotiation, we don't have an objection to
11 that, but if he then says I looked at the real world and
12 they didn't change their product, that is evidence that
13 there was not a non-infringing alternative, I don't see how
14 he can do that now when we have in the real world we didn't
15 change our product because IBM said don't change your
16 product.

17 THE COURT: First of all, did he disclose that
18 his opinion was that you didn't change and, therefore, that
19 leads him to believe that there was no non-infringing
20 alternative?

21 MR. HADDEN: He said --

22 THE COURT: Would you be able to point me to
23 where he disclose that opinion? Don't run away yet. Is it
24 your belief that he did disclose that?

25 MS. STEPLER: It is in his report, yes.

Hausman - direct

1 THE COURT: Okay. We'll come back to that. But
2 you have a further argument, I suppose, even if it is in
3 this report.

4 MR. HADDEN: If it is because he's now opining
5 that the reason we didn't change is because it wasn't
6 available, the factors change, IBM repeatedly said in the
7 NDA, we don't expect you to change, we're not asking you to
8 change, we expect you to --

9 THE COURT: I'm going to ask you a question and
10 whoever wants to answer can. Are you going to oppose either
11 on cross with this witness or as part of their case that
12 bringing out the fact, if it is a fact, that the reason that
13 at least in part they didn't change what they were doing was
14 reliance on this NDA.

15 MR. DESMARAIS: Yes, we were going to oppose
16 that for reasons argued earlier at side-bar.

17 THE COURT: Doesn't this suggest that this is a
18 little bit misleading to the jury if, in fact, they have
19 evidence that that was one reason that they didn't change?

20 MR. DESMARAIS: I don't think it's relevant
21 because regardless of what it says in that NDA, Groupon had
22 incentive to change because by not changing, they're
23 incurring damages, they're making the argument here that the
24 royalty should be lower because it was a non-infringing
25 alternative. As a matter of economics, regardless of the

Hausman - direct

1 NDA, the NDA doesn't say you're not going to pay damages
2 during this time period. In fact, we're charging for
3 damages the whole time period. They could have avoided
4 damages entirely by changing to a non-infringing
5 alternative. That's all Dr. Hausman said, they could have
6 avoided damages by changing.

7 MR. HADDEN: Can I respond? There is several
8 NDAs. The first one says we will not seek damages from the
9 period 2011 to the end of 2012. All of them --

10 THE COURT: Do you disagree with that fact that
11 there is an NDA that says we won't seek damages?

12 MR. DESMARAIS: I need to defer to Mr. Oussayef
13 for that.

14 THE COURT: Let's first figure out if his
15 opinion has even been disclosed.

16 MS. STEPLER: May I go grab his report?

17 THE COURT: Yes. You can all step away.

18 So first we're trying to deal with the issue of
19 whether the way IBM wishes or believes that Mr. Hausman will
20 respond about the non-infringing alternative or lack
21 thereof, where was that disclosed.

22 MS. STEPLER: This is from paragraph 195 of his
23 opening report where he says, "Indeed, although this case
24 was filed in March 2016, Groupon still has not implemented
25 any alleged alternative to the '849 patent in lieu of using

Hausman - direct

1 the technology of the '849 patent. Especially when combined
2 with the assumption of validity and infringement of the
3 '849, Groupon's failure to identify an available,
4 acceptable, and cost-effective non-infringing alternative
5 further strengthens IBM's established bargaining position
6 relative to Groupon at the hypothetical negotiation."

7 I will note that this paragraph appears for the
8 other three patents as well.

9 THE COURT: All right. Does that respond to --

10 MR. HADDEN: No. What it said is, talking about
11 the hypothetical negotiation and the assumption of validity
12 and infringement. That's saying at the time of the
13 negotiation, not taking into account what happens after. I
14 mean, the fact that --

15 THE COURT: So tell me again what it is you
16 expect he's going to respond if we go forward with his
17 opinion on non-infringing alternatives?

18 MS. STEPLER: Honestly I think he's going to
19 say he discussed it with Dr. Schmidt and he understands
20 there are no non-infringing alternatives, and then he'll say
21 which party that benefits.

22 THE COURT: You think that's all you're trying
23 to elicit?

24 MS. STEPLER: Yes.

25 THE COURT: Do you object to the elicitation of

Hausman - direct

1 the opinion that I understand based on the technical expert
2 there are no non-infringing alternatives and that is a
3 factor that favors IBM?

4 MR. HADDEN: That's fine. It's just the notion
5 that because they didn't do something for this period that
6 shows there are no non-infringing alternatives, that's my
7 objection.

8 MS. SHAMILOV: This is what we're going to go
9 with. I would like to strike the last comments of Dr.
10 Hausman.

11 THE COURT: Do you object to that?

12 MS. STEPLER: I would oppose that.

13 THE COURT: Let me hear what it was at this
14 point.

15 (The reporter read back as requested.)

16 THE COURT: So you want to strike all of that?

17 MS. SHAMILOV: Correct.

18 THE COURT: What is your position?

19 MS. STEPLER: Our opinion is that it was
20 disclosed in the report and we think he should be permitted
21 to testify, based on the sentence that I read earlier.

22 THE COURT: Did you hear something there that
23 was not disclosed?

24 MS. SHAMILOV: I just think to be consistent
25 with the discussion, we can reask the question and have

Hausman - direct

1 Dr. Hausman respond with that in mind, which was the
2 hypothetical negotiation.

3 THE COURT: I'm not going to order it stricken
4 at this point. But if the testimony that comes in in
5 response to your new question is something beyond what you
6 indicated you expect, you'll have to object and we'll come
7 back here.

8 MS. SHAMILOV: And just one more question for
9 clarity, Your Honor. I was planning to bring up the NDA,
10 where they promised not to seek damages for Dr. Hausman to
11 ask him would he actually consider that. It's highly
12 prejudicial otherwise. We have a promise from IBM not to
13 seek that, then they completely blew it. It's highly
14 prejudicial for us not to raise that with Dr. Hausman.

15 THE COURT: I note we have Mr. Oussayef here at
16 side-bar. A representation was made for at least one year
17 there is an NDA that indicates that IBM agrees not even to
18 seek damages I suppose for infringement for that year. So
19 one question that came up was, is that true, does IBM
20 dispute that?

21 MS. SHAMILOV: It's right here.

22 MR. OUSSAYEF: Your Honor, I don't know having
23 just seen it right now, but I don't think the proper form is
24 in cross-examination for this.

25 THE COURT: That's a different question. But do

Hausman - direct

1 you know as a factual matter, does IBM dispute that, in
2 fact, they did contract away their right to seek damages for
3 at least the one year that's at issue here?

4 MR. OUSSAYEF: I'm not sure.

5 MR. DESMARAIS: Maybe we can do this. I agree
6 with Mr. Oussayef, this shouldn't be coming up now.

7 THE COURT: Here is what we're going to do.

8 MR. DESMARAIS: We can stipulate, it doesn't
9 need to be cross-examination.

10 THE COURT: Here is what we're going to do.
11 Finish the direct and then we'll take a break and talk about
12 this at the break.

13 (End of side-bar discussion.)

14 THE COURT: Good morning. Thank you, ladies and
15 gentlemen. We'll be ready to proceed in just a moment.

16 BY MS. STEMLER:

17 Q. So Professor Hausman, you considered all of the
18 proposed noninfringing alternatives -- I'm sorry. You
19 discussed all of Groupon's proposed noninfringing
20 alternatives with Dr. Schmidt; right?

21 A. Yes.

22 Q. Okay. And which party at the hypothetical
23 negotiation doesn't benefit that there are no noninfringing
24 alternatives?

25 A. This gives IBM better bargaining power, so it favors

Hausman - direct

1 them.

2 Q. Okay. Great. Let's move on to slide 70. What was
3 the next factor that you considered?

4 A. Well, the next factor is that the patents-in-suit are
5 important to the accused products.

6 Q. And who does that favor at the bargaining table?

7 A. IBM.

8 Q. And why is that?

9 A. Because they own the patents-in-suit.

10 Q. What was the next factor that you considered?

11 A. The accused products are popular and commercially
12 successful.

13 Q. And, I'm sorry. Did I cut you off?

14 A. No, it's this benefits IBM because this says that the
15 products that are using the patents are leading to good
16 profits for Groupon.

17 Q. Okay. Let's keep going. What is the next item you
18 considered?

19 A. The accused products generate revenue from other
20 Groupon products. And that's what we talked about at the
21 very beginning, like bread crumbs.

22 Q. What does that favor?

23 A. That favors IBM because, again, the patent, the
24 patents are being used, and then the services from those are
25 creating more revenue and profits for Groupon.

Hausman - direct

1 Q. Moving on to the next factor. What was the next
2 factor that you considered?

3 A. The Filepp patents led numerous companies to take a
4 license to IBM's portfolio.

5 Q. Who does that favor at the bargaining table?

6 A. That favors IBM because that says a lot of other
7 companies have found these valuable enough to pay for.

8 Q. Then, finally, what was the last factor you
9 considered?

10 A. The last factor is that IBM, as Mr. McBride
11 testified, has extensive licensing experience while Groupon
12 only enters licenses to settle disputes.

13 Q. And who will that favor at the hypothetical
14 negotiation?

15 A. Well, that is IBM again.

16 Q. And why is that?

17 A. Well, because they know how to do it and they have
18 done it, you know, tens, if not hundreds of times. And so
19 they know how to structure the bargaining and to try to get
20 a good deal.

21 Q. Right now, the factors that you analyzed that are
22 benefitting IBM, would Groupon have come to the table with
23 anything to support its position?

24 A. Yes, Groupon has an important thing on its side. And
25 that is, Groupon provides the services that generates the

Hausman - direct

1 profits. They're going to pay for the royalty to IBM. If
2 Groupon weren't there, if they had crummy services, no one
3 wanted to buy, there would be no profits. So to my way of
4 thinking as an economist, that is a strength of Groupon.
5 They're saying we're the ones who are generating profits and
6 that gives us a good bargaining position.

7 Q. Let's move on to the next slide. What did your
8 analysis of the parties' bargaining position tell you about
9 how they would agree to share economic benefit of the
10 patent?

11 A. Based on all these factors, I determined that a 50/50
12 split would be likely the outcome of the hypothetical
13 negotiation.

14 Q. Now, the top of this slide says '967, '849, and '601
15 patents; right?

16 A. Yes, that's right. That's where I determined 50/50
17 would be likely.

18 Q. Just for clarity, you are talking about 50 percent of
19 the apportioned profits you calculated earlier with us?

20 A. Yes. That is not all the profits, it's just the
21 profits that arise from the patents, the use of the patents.

22 Q. Let's look at slide 79. What about the '346 patent?
23 What would the parties have agreed on there?

24 A. Here, I give two-thirds of the profits to Groupon and
25 only one-third to IBM.

Hausman - direct

1 Q. And why did you write a different share for the '346
2 patent arrive?

3 A. Well I don't think the patent is as important at the
4 end of the day to Groupon's profits.

5 Q. What do you mean by that?

6 A. Well, it gets more customers and more sales and more
7 profits from the use of the patent, but if it didn't use
8 the patent, people would still sign on, just fewer people I
9 think would do it. They would have less profits.

10 Q. So just to be clear, is it your view that the '346
11 patent is just not as important to Groupon's profits as the
12 other three?

13 A. That is the idea, yes.

14 Q. Okay. Thank you. Let's go to the final slide of
15 your presentation. Professor Hausman, what would be the
16 reasonable royalty in your opinion for the '967 patent?

17 A. \$23,546,921.

18 Q. And for the '849 patent, what is your reasonable
19 royalty?

20 A. \$59,166,569.

21 Q. And what about for the '601?

22 A. \$40,691,044.

23 Q. And the '346?

24 A. \$43,064,289.

25 Q. So just to be clear, this is the number that you

Hausman - direct

1 arrived at after you applied your bargaining shares; is that
2 right?

3 A. Yes. For the three patents it's 50/50, and the last
4 it's one-third, two-thirds.

5 Q. What is your final conclusion for the reasonable
6 royalty in this case?

7 A. \$166,46,823.

8 MS. STEPLER: Thank you, Mr. Hausman.

9 THE COURT: That's it for the direct; correct?

10 MS. STEPLER: Yes.

11 THE COURT: Okay. Ladies and gentlemen, I'm
12 going to give you your afternoon break at this point. No
13 talking about the case and we'll get you back.

14 (Jury left courtroom.)

15 THE COURT: All right. So as I indicated, let's
16 talk about one of the issues that arose at sidebar. Others
17 can sit or leave. And, Ms. Shamilov, do you want Mr.
18 Hausman not in the courtroom for this discussion?

19 MS. SHAMILOV: Yes, please, Your Honor.

20 THE COURT: Okay. Mr. Hausman, we're going to
21 ask you to take a break. Step out. I'll see you in a
22 little bit.

23 MS. SHAMILOV: Your Honor, I would also like Mr.
24 McBride out of the courtroom.

25 THE COURT: Mr. McBride out of the courtroom?

Hausman - direct

1 MS. SHAMILOV: Yes, because there is a request I
2 will make potentially that will implicate him.

3 THE COURT: Okay. Mr. McBride, if you would be
4 kind enough to step out of the courtroom for this break, I'd
5 appreciate it. Thank you.

6 (Pause.)

7 THE COURT: I'll note both Mr. Hausman and Mr.
8 McBride left the courtroom. Go ahead.

9 MS. SHAMILOV: Thank you, Your Honor. So
10 earlier during Mr. McBride's cross, we discussed the MIL 1
11 issue, and the MIL 1 that was granted by the Court was to
12 preclude IBM from presenting referenced evidence, argument,
13 and testimony regarding the substance of the parties'
14 pre-suit exchanges and failure to obtain advice of counsel.

15 That was the only MIL that was granted with
16 respect to pre-suit communications.

17 The MIL that -- IBM's MIL that was granted only
18 to preclude Groupon from offering evidence or argument
19 relating to opinion for advice of counsel regarding
20 Groupon's defenses prior to this lawsuit.

21 So the only MIL we have that applies to pre-suit
22 communications is Groupon's MIL 1 that says, that asked to
23 preclude IBM from using those communications basically
24 against Groupon in this case. That's the MIL.

25 Now, the NDA that we wanted to show on Mr.

Hausman - direct

1 McBride, and that I would like to use with Professor
2 Hausman, were entered by the parties, they're not subject to
3 this MIL. Right? These are not communications. We have
4 signed agreement. And it is certainly not something that
5 IBM is trying to use. We're just putting it in front, want
6 to put it in front of Mr. McBride and want to put it in
7 front of Professor Hausman. And here is the language that
8 is in there. And if you can see it.

9 The discloser therefore agrees that it will not
10 seek, with respect to patents or patent applications owned
11 by discloser, or as to which the discloser has rights, as of
12 the date of the execution of this supplement, or as to which
13 -- No. 2, damages relating to recipient's continued use or
14 provision of such services, systems, processes and/or
15 products during the period from February 14, 2012 to the
16 final disclosure date (the period). The final disclosure
17 date.

18 May I move this document?

19 THE COURT: Sure.

20 MS. SHAMILOV: It's December 31st, 2013.

21 So during the period from February 14th, 2012
22 through December 31, 2013, there is a contractual obligation
23 for IBM not to seek damages, yet in this case Professor
24 Hausman used that period in his calculations.

25 Furthermore, this NDA, multiple NDAs say,

Hausman - direct

1 disclosure has not demanded, nor does it expect, that
2 recipient will cease or terminate any such activities --
3 referring to paragraph before -- and discloser therefore
4 agrees that it will not seek, with respect to patents or
5 patent applications -- and it just keeps going.

6 And then further, the argument at the end of
7 this paragraph, it talks about that it will not use this
8 notice of the patent during the period as a basis for
9 increasing or enhancing any damages sought from the
10 recipient.

11 So we have NDAs that are not subject to the MIL
12 because the MIL was very specific, besides this is not a
13 communication and it's not what IBM was trying to use, that
14 they, that IBM will not seek damages, and that IBM will not
15 seek willfulness.

16 THE COURT: Well, does it say it won't seek
17 willfulness?

18 MS. SHAMILOV: There is another --

19 THE COURT: Hold on.

20 MS. SHAMILOV: I'm sorry.

21 THE COURT: It doesn't say it won't seek
22 enhanced damages.

23 MS. SHAMILOV: There is another NDA that I can
24 find that says, will not seek enhanced damages by asserting
25 willfulness.

Hausman - direct

1 THE COURT: So what is it that you now propose
2 to do?

3 MS. SHAMILOV: So here is what I propose to do,
4 because I do think it is highly prejudicial in light of the
5 language of the MIL, and that this NDA were discussed and at
6 no point did IBM came back and say, well, if you going to
7 grant this MIL, they should also not be talking about NDA.

8 This is highly prejudicial for us not to be able
9 to use. So my proposal is I would like to cross Professor
10 Hausman on this NDA with respect to the damages period, you
11 know, put it in front of him and have him confirm that he
12 did not exclude this period from his damages calculation.

13 And I ask, to alleviate the prejudice, if Mr.
14 McBride is still here, to brings him back on the stand for
15 very short cross and redirect on just this issue.

16 THE COURT: All right. We'll hear from IBM.

17 MR. OUSSAYEF: Your Honor, in effect what we
18 have here is an extremely untimely counterclaim for contract
19 enforcement in this case at trial after the witness that
20 they wanted to cross-examine Mr. McBride is already down
21 from the stand.

22 THE COURT: Well, let's --

23 MR. OUSSAYEF: You don't --

24 THE COURT: Hold on. Let's break it down.

25 Let's start first with the request to cross the

Hausman - direct

1 witness who is on the stand with the NDA. Apparently, he
2 did not or they expect he will say he didn't exclude the
3 time period for which IBM may have no right to seek damages.
4 Do you object to that part of the request of relief?

5 MR. OUSSAYEF: Yes, Your Honor. Because that
6 creates a trial within a trial. We would have to -- we do
7 not believe this agreement is enforceable, and we had a
8 story to tell about pre-suit communications. At Groupon's
9 request, pre-suit negotiations have been MILED out and their
10 request is now we get to use the piece we like, i.e., the
11 supposed agreement about conduct arising from that period,
12 not, you know, all conduct before the lawsuit but conduct
13 arising from that period, to cross an expert on this
14 material when it wasn't in their expert report. It wasn't
15 in our expert report. It was not even in issue in the case.
16 And to do that at this late stage isn't the proper remedy.

17 To cross-examine a witness on this when there is
18 a disagreement about whether the agreement is enforceable
19 and what it means and how to interpret it would be very
20 prejudicial because it takes the agreement out of context of
21 the entire pre-suit discussions and whether it is enforceable
22 and what it means and what the contract language is.

23 THE COURT: What is the proper remedy to
24 terminate if this agreement is enforceable?

25 MR. OUSSAYEF: I don't think there is a remedy

Hausman - direct

1 at this stage. I mean afterwards if Groupon wants to, I
2 don't know, have some kind of contract claim or something
3 like that, I don't know what they would choose to do, but
4 that is not an issue in this case.

5 This case is a patent case and we have no
6 counterclaims on this issue. We had no disclosure in expert
7 reports. We had nothing at summary judgment. I mean I
8 think the proper thing is if they really thought this
9 agreement was enforceable, why didn't we see this at summary
10 judgment to say this period of -- it should not be willful
11 or this period, you know, should be interpreted as falling
12 under the contract. And to cross-examine a witness at trial
13 is just kind of another example doing something at the last
14 minute.

15 I mean even McBride, bringing him back on the
16 stand, there is no reason why they couldn't have crossed
17 McBride on this agreement if they really thought that it
18 meant something. So I think right now what, it's way too
19 late to open up a new dispute in the case that has never
20 come up before. In fact, we even moved on summary judgment
21 on licensing defenses and we heard nothing from defendants.
22 And the Court granted summary judgment on licenses, and
23 there is nothing except for the Facebook or Google license.

24 THE COURT: With respect to Mr. McBride, I think
25 we had a sidebar, and I said they couldn't examine him on

Hausman - direct

1 the NDA. Isn't that what happened?

2 MR. OUSSAYEF: Yes, that's right, Your Honor.

3 And I think for the exact same reasons, we shouldn't go
4 into cross-examining Dr. Hausman on this. It is not
5 sword/shield example where they want to MIL out all pre-suit
6 communications except for the ones that benefit them some
7 that they can use them out of context.

8 THE COURT: Well, what about the argument that
9 the MIL only really sought to exclude communications and I
10 shouldn't see the agreements as communications?

11 MR. OUSSAYEF: The agreement is called a
12 nondisclosure agreement because the parties weren't to
13 disclose information. And, of course, the agreement had to
14 be communicated to each party so that they could actually
15 sign it. So I think it falls squarely within the MIL.

16 THE COURT: So then the plaintiffs are going to
17 adhere to the position I presume for all purposes throughout
18 trial that these NDAs should not be shown to the jury for
19 any reason?

20 MR. OUSSAYEF: That's correct, Your Honor.

21 THE COURT: And you think that that is what I
22 ruled in granting Groupon's MIL No. 1?

23 MR. OUSSAYEF: I think, my interpretation of
24 the Court's ruling is that pre-suit discussions are not to
25 be admitted, and that includes the NDAs. It also includes,

Hausman - direct

1 you know, a lot of evidence of willfulness about how we
2 communicated with Groupon nonstop to try to get them to
3 engage in a license and how they rebuffed us at every turn,
4 and how they had no noninfringement positions they came
5 back with. And they didn't make any invalidity arguments
6 and they delayed nonstop.

7 We had a whole story to tell there, and putting
8 that out of the trial but allowing just the sliver of here
9 is our proposed NDA without any context or any experts to
10 interpret it or any guidance for the jury as to what the
11 contracts mean would be, you know, totally out of context
12 and very prejudicial to IBM at this late stage.

13 THE COURT: And on the flip side, though, if there
14 is evidence that one reason Groupon didn't change its behavior
15 after hearing from you all is they were relying on these NDAs,
16 and you are suing them for willful intentional infringement,
17 and they have evidence that they subjectively did not change
18 in reliance that is in part on those agreements, how can I
19 justify not letting the jury hear that?

20 MR. OUSSAYEF: That should have been something
21 their witnesses testified to on in the depositions.

22 Furthermore, we had a specific interrogatory
23 that said, you know, tell us your basis for any actions you
24 took or didn't take. And there was nothing about these
25 licenses. In fact, there has been nothing about this the

Hausman - direct

1 entire case.

2 THE COURT: Okay. Thank you.

3 Ms. Shamilov.

4 MS. SHAMILOV: Your Honor, I found the
5 willfulness language, if you would like to see.

6 THE COURT: Sure.

7 MS. SHAMILOV: Here is what it says: In the
8 event of litigation, discloser and its related companies
9 shall not seek to enhance those damages by asserting willful
10 patent infringement, if any, that arise during the period.

11 THE COURT: And some part of the period that
12 this agreement speaks to overlaps with the case.

13 MS. SHAMILOV: Correct. Yes. Well, and so it's
14 within the infringement period and the damages period. Yes,
15 Your Honor.

16 So the issue that counsel just talked about
17 sort of the communications back and forth and Groupon not
18 agreeing to pay IBM, you know, for whatever during those
19 communications and not putting forth noninfringement and
20 validity argument, none of that is relating to what we are
21 trying to do. And all we're trying to say is you signed,
22 these are not proposed agreements, they're signatures.

23 IBM signed three agreements. These are not
24 communications. These are agreements. We're not talking
25 about going back and forth. And in this agreement, there

Hausman - direct

1 is this language. We're not saying, you know, it's valid
2 and enforceable. This is the agreement. You signed this
3 agreement, yes or no. That is for Mr. McBride. And for
4 Professor Hausman is the parties signed this that says
5 this particular period should not be considered but you
6 considered it and included it in your entire damages
7 analysis.

8 I think when we were discussing the MIL, when
9 you look at the briefing, the issue was -- right? -- you
10 cannot use the back and forth four-way communications to
11 establish liability or just, you know, indirect infringement
12 because it is all 408, highly prejudicial. That was the
13 context. That is why the MIL was phrased, and that was
14 granted to preclude IBM from using the communications --
15 right? -- this is different. This is different subject
16 matter and it is not communications between the two parties
17 with signed NDA.

18 THE COURT: What I'm hearing from IBM is that at
19 least one thing is that your expert has not considered these
20 NDAs either; is that correct? Your damages expert.

21 MS. SHAMILOV: Our damages expert has a
22 completely different calculation and he hasn't considered
23 these NDAs.

24 THE COURT: He is not.

25 (Counsel confer.)

Hausman - direct

1 MR. HADDEN: I was just going to say our expert
2 proposed a lump sum. It doesn't depend on the damage
3 period.

4 THE COURT: Right. But did he disclose any
5 consideration of these NDAs?

6 MS. SHAMILOV: I don't believe that is in his
7 report. But I don't think that is an issue; right? These
8 are the NDAs that IBM produced in discovery. This is
9 their --

10 THE COURT: Well, it may be relevant only in
11 trying to figure out, you know, based on what I had
12 understood about the MIL and my ruling and what happened
13 this morning, and it seems the parties' positions were
14 consistent with this. These NDAs were not part of this
15 trial. So I'm trying to understand, is there any way that
16 IBM should have understood before today that these NDAs, in
17 light of my ruling, were going to have a role in this trial
18 at all?

19 MS. SHAMILOV: I think so, Your Honor. Because
20 when we briefed it, we said the communications, the back and
21 forth between the parties have no relevance to infringement
22 or what IBM said or how we responded with amounts and we
23 don't infringe and all that. And we used the language from
24 the NDAs to say why it goes back and why those back and
25 forth should be excluded under 408. And that is why, when

Hausman - direct

1 we drafted the MIL, we drafted the MIL to ask the Court to
2 prevent IBM from using the substance of the parties pre-suit
3 communications. Right?

4 So these are the back and forth between the
5 parties. We would have never asked for a MIL to exclude the
6 NDA that we specifically relied on as the reason why the
7 back and forth.

8 THE COURT: So how about the response to
9 interrogatories that was referenced? I mean have you all
10 disclosed at any point in this case that the NDAs had
11 something to do with your defense or your claims on some
12 issue in this case?

13 MS. SHAMILOV: I'm not sure which interrogatory.

14 THE COURT: Let me ask you. I mean, do you
15 think you could point to anywhere where you put them on
16 notice that the NDAs were relevant to your defense or to
17 your claims in any way in this case?

18 MS. SHAMILOV: At a minimum, it was in the MIL
19 because Mr. Tinsley pointed out the language that IBM
20 agreed in the agreement to not seek damages for willful
21 infringement for certain period. At a minimum, it was
22 there. They knew that is what we were going to be relying
23 on because, honestly --

24 THE COURT: So you think when I go back and
25 look at the briefing on the MIL, I will understand that you

Hausman - direct

1 intended to rely on the NDAs and put them in front of the
2 jury and that you made a distinction between the agreements
3 and the communications that led to the agreements?

4 MS. SHAMILOV: I believe so. Because when we
5 were -- in the briefing we were talking about here are the
6 agreements, and we wanted to exclude the communications
7 pursuant to this agreement for back and forth. That is how
8 we briefed it.

9 And, again, the MIL was not presented to
10 preclude us from using the agreement. All that was granted
11 was to not allow IBM to use the communication to establish
12 willfulness, liability, indirect infringement pursuant to
13 408. There is nothing in the MIL that was granted that
14 would prevent Groupon from using the agreements in the case
15 as a defense.

16 Exclusion of it is highly prejudicial to our
17 case considering that in this case IBM was claiming willful
18 infringement and we have three NDAs that say they will not
19 seek, they did not ask us to cease our activity. The fact
20 that you don't have to stop what you are doing. And in
21 one of them, and in several of them they said I'm going to
22 not seek enhanced damages by asserting willful patent
23 infringement, which they're doing here. I think exclusion
24 of this is outside of the MIL. It's not a communication,
25 and highly prejudicial to Groupon.

Hausman - direct

1 THE COURT: Okay. You can come back if you
2 want.

3 MR. OUSSAYEF: Your Honor, there was no
4 disclosure of this late theory that the NDA somehow affects
5 damages. The PTO, the pretrial order with the list of
6 issues to be tried has nothing about this. The expert
7 reports, remember that, counsel for Groupon had to respond
8 to our damages report with their own damages report and
9 there was nothing in there about the fact that they thought
10 there was an agreement that limited damages in some way.

11 In fact, counsel for Groupon even said in the
12 last argument that she wasn't saying that the license
13 agreement is even necessarily valid and enforceable.
14 Indeed, we will have no opportunity to show that, you know,
15 the agreement isn't enforceable or that it's being
16 interpreted incorrectly if they use it to cross-examine our
17 expert when he hasn't had a chance to review it. And that
18 will put the license completely out of context.

19 In fact looking at the language in the Elmo I
20 think is especially appropriate because it says that arise
21 during the period. That's the last part that's underlined
22 on the Elmo right now.

23 And this was after Groupon had notice of the
24 Filepp patents, so this NDA wasn't about notice of the
25 Filepp patent, this was about if they engaged in discussions

Hausman - direct

1 and talked about some other patents, and had some kind of
2 discussions there, maybe there is an argument that there is
3 some kind of fact about additional patents outside of this
4 lawsuit. But that's not even at issue here.

5 And to simply view it in a narrow light that
6 we're going to present our interpretation of this license
7 after IBM has put on the majority of its case and in
8 cross-examination of IBM's last witness, to throw it in out
9 of context after precluding all pre-suit discussions and all
10 willfulness discussions that we wanted to have including
11 putting this agreement in context would be highly
12 prejudicial.

13 There is no prejudice to Groupon. If they think
14 we're violating some agreement, they can bring a breach of
15 contract later in the case. There is not prejudice to them.
16 There is significant prejudice of having a one-sided
17 interpretation of this agreement come up in this case at
18 this late, late stage.

19 THE COURT: So if I were to go back and look at
20 your interrogatories, can you represent that you served one
21 asking them to tell you what they were relying on in
22 response to damages and in response to subjective intent to
23 infringe, and I won't see there anywhere that they disclosed
24 to you that we're relying at least in part on these NDA
25 provisions?

Hausman - direct

1 MR. OUSSAYEF: That's correct. So there is two
2 interrogatories I have in mind. One was on their
3 calculation of damages where it wasn't identified, and the
4 second is on reaction to knowing about the patents and
5 anything that was done there. And those are the two
6 interrogatories that I have in mind and it was not disclosed
7 in response to either of those interrogatories.

8 THE COURT: Thank you.

9 Ms. Shamilov.

10 MS. SHAMILOV: Your Honor, with respect to the
11 two interrogatories, I have the to go and check the damages
12 one. It ask about calculation of our damages because our
13 expert used the lump sum, so it doesn't matter sort of what
14 period it covers, it says they would have agreed to one lump
15 sum payment. He didn't need to sort of slice and dice the
16 damages period.

17 THE COURT: But it's hard for me to understand
18 how it would be fairer to go through all the trouble you go
19 through for fact discovery, expert discovery, pretrial
20 order, and you all have an argument that one or more years
21 of damages is just, per se, off the table, and you don't
22 disclose it until this morning. You know, you're saying
23 maybe it was implicit in the MIL briefing, I'll give you
24 that for just this moment for sake of the question, why
25 wouldn't that be too late?

Hausman - direct

1 MS. SHAMILOV: I think, Your Honor, there is an
2 interrogatory that they can point to that says, for example,
3 what documents or what arguments you will rely on for, you
4 know, in rebuttal to the damages calculation, whatever it's
5 phrased, I don't think there was an interrogatory like that.
6 The interrogatory that Karim mentioned about what is it that
7 you did to avoid infringement or alleged infringement, that
8 doesn't ask for this, we just respond and said we did not
9 change our system. That is what you ask for in an
10 interrogatory, that is the answer I provided.

11 I think the issue becomes, I'm not supposed to
12 get up or through the discovery voluntarily disclose
13 everything I may use in the case. Discovery works, you ask
14 for it, you get it, and then you just get the exchange of
15 expert reports and on damages we respond to the issues that
16 were raised, and our damages value particular sort of
17 different methodology.

18 But we have two issues in these agreements. One
19 agreement says they want to seek damages for a particular
20 period. And three NDAs say they will not seek enhanced
21 damages by asserting willful infringement. Those are the
22 two issues that are here and they're somewhat separate, Your
23 Honor.

24 THE COURT: Anything else?

25 MS. SHAMILOV: No. Thank you.

Hausman - direct

1 THE COURT: Mr. Oussayef, you have more?

2 MR. OUSSAYEF: Your Honor, we served
3 interrogatory on damages theories. We had expert discovery
4 on damages theories. We had a pretrial order to have a
5 disclosure of all the theories that would be tried in this
6 case. Throughout all of that process we heard nothing about
7 this NDA. It's just way too late.

8 THE COURT: Anything else?

9 MS. SHAMILOV: The burden, it's not the burden
10 on us to prove damages, the burden is them to prove damages
11 and if our expert on damages issue setting aside the
12 willfulness language on the agreement, if our expert decided
13 not to slice and dice the period, and just say lump sum
14 that's what they would have agreed to and be done with, I
15 don't think I was supposed to go and rebut every single
16 document out there that may relate to the issue, he just
17 analyzed the damages in response to their report in a
18 different way that he decided was applicable.

19 I'm not aware of any interrogatory that said
20 identify documents you will rely on potentially in all of
21 your damages, for all of your damages opinions. I'm just
22 not aware of that interrogatory, Your Honor.

23 THE COURT: All right.

24 MS. SHAMILOV: Thank you.

25 THE COURT: We'll take a break.

Hausman - direct

1 (Brief recess taken.)

2 * * *

3 (Proceedings reconvened after recess.)

4 THE COURT: Have a seat. I'm going to give you
5 a ruling on the issues that are before me.

6 Let me note first for the record I'm charging
7 time 50/50 for this discussion that we've had ever since the
8 direct ended and for this ruling.

9 As I see it, the issues before me right now are
10 whether or not to allow Groupon to call back Mr. McBride and
11 whether to allow Groupon to cross-examine Mr. Hausman, both
12 of those with respect these NDAs, and I have decided not to
13 allow Groupon to do either of those things. Let me try to
14 explain why.

15 I am replying in part for my ruling on the
16 representations, the consistent representations from IBM
17 that were I to have the time to go back and look at all the
18 interrogatories served and the responses thereto, that I
19 would not find at any point in those interrogatories the
20 defendant ever disclosing to IBM that part of its defense
21 either to damages or to the willfulness allegations was
22 reliance in part on these provisions in the NDAs.

23 I understand from defendant that they
24 acknowledge that their damages expert did not disclose in
25 his report or I take it in his deposition that any part of

Hausman - direct

1 his analysis on damages was consideration of or reliance on
2 the NDAs.

3 My understanding -- I won't pretend that I went
4 back and read the entirety of it, but my understanding is
5 that the pretrial order also does not indicate in any way
6 that Groupon is relying or that part of his defense to
7 either damages or willfulness is a reliance on the
8 provisions of the NDAs. At best, as I understand Groupon's
9 position, it is that they disclosed in connection with the
10 motion in limine briefing that they were going to rely on
11 the NDAs for part of their defense at least on willfulness,
12 and I suppose they might argue with respect to damages, too.

13 I have gone back and looked at the briefing on
14 the MILs, and I just don't see that. And I don't think, it
15 certainly wasn't how I read the briefing at the time. It's
16 not how I read it now.

17 I did not intend, by my order on the MILs, to
18 distinguish in such a way that would allow Groupon to rely
19 on pre-suit communications but IBM not. And I didn't intend
20 to distinguish between the NDAs as agreements versus all
21 other types of pre-suit communications. To the extent
22 that was unclear, I think I clarified it this morning in
23 connection with the sidebar that arose with respect to I
24 think it was Mr. McBride, but it was the witness this
25 morning. And I am hereby further clarifying it. I have not

Hausman - direct

1 seen that there was adequate disclosure in a pretrial basis
2 by the defendant of its intent to rely in any way on these
3 NDAs and specifically with respect to damages or
4 willfulness.

5 Now, with respect to the motion in limine, at
6 best, and I think this is entirely ambiguous if I read it in
7 favor of Groupon, at best, there was footnote 1 at D.I.
8 305-2, page 3, footnote 1, where Groupon said: This motion
9 does not intend to prevent Groupon from relying on the
10 parties' agreement or the fact that Groupon was represented
11 by counsel during the pre-suit negotiations at IBM; and if
12 IBM will be allowed to rely on the pre-suit negotiations,
13 Groupon intends to rely on them in defense to and in
14 rebuttal of IBM's claims and positions.

15 So at best, that is ambiguous and indicates
16 perhaps maybe Groupon was trying to tell us that they were
17 reserving the right to rely on the agreements. However, how
18 I read it, and I think it is the better reading, is, hey, if
19 our motion in limine is denied and you allow IBM to bring
20 in these pre-suit communications, that is, if IBM will be
21 allowed to rely on pre-suit communications, then, but only
22 then, Groupon intends to rely on them in defense to and
23 rebuttal of IBM's claims and positions.

24 In context again, it is ambiguous. I don't read
25 it the way Groupon might want me to, but in context, it is

Hausman - direct

1 not an adequate disclosure of that position.

2 At bottom, my view is in general, civil trials,
3 particularly civil jury trials, are not supposed to be
4 exercises in surprise. That's what the rules of discovery
5 are for. You should all pretty much know what you are going
6 to hear from every witness at trial. You should certainly
7 know the major themes and theories. And it is just simply
8 too late to ask me to throw this trial in a different
9 direction and make the NDAs part of it.

10 Now, it may be -- I am making no ruling on this
11 whatsoever. It may be outside of this case, Groupon has a
12 claim against IBM. Don't know. It may also be that Groupon
13 has some rights they could try to assert post-trial in
14 connection with briefing on any post-trial motion. I don't
15 know. I'm not saying they do and I'm not saying that if
16 post-trial Groupon seeks that relieve that IBM can't say
17 this is an untimely request. I take no view on any of that
18 at this point. But in terms of how this trial is going to
19 proceed, I'm again ruling that the NDAs are out. So any
20 questions about that or anything further on this?

21 MS. SHAMILOV: No, Your Honor.

22 THE COURT: Any questions or anything further?

23 MR. OUSSAYEF: No, Your Honor.

24 THE COURT: Okay. We'll bring the jury in.

25 All right. We need to bring the witness back.

Hausman - cross

1 (Jury entering the courtroom at 3:06 p.m.)

2 THE COURT: Ladies and gentlemen, we are ready
3 to proceed. Ms. Shamilov, whenever you are ready.

4 MS. SHAMILOV: Thank you, Your Honor. May I
5 approach the witness, Your Honor?

6 THE COURT: You may.

7 CROSS-EXAMINATION

8 BY MS. SHAMILOV:

9 Q. Good afternoon, Professor Hausman.

10 A. Hi.

11 Q. If Groupon does not infringe the patents-in-suit, IBM
12 is not entitled to any damages; is that right?

13 A. That is correct.

14 Q. And if the jury finds that IBM's patents in this suit
15 are invalid, IBM is also not entitled to any damages?

16 A. If they are all four invalid, you are correct.

17 Q. Thank you. I would like to start talking a little
18 bit about the licenses. And I might direct you to the
19 screen, it might help you.

20 We talked about Amazon's license; right?

21 A. Yes.

22 Q. And Amazon paid to IBM \$49.8 million; correct?

23 A. Yes. It allowed IBM to use, I think they have eight
24 or 9,000 patents. So they made --

25 Q. I'm sorry, that was a yes or no question.

Hausman - cross

1 A. Okay. Yeah.

2 Q. Thank you.

3 And in that, according to that patent license,
4 IBM allowed Amazon to use over 40,000 of its patents in
5 Amazon's business, is that right?

6 A. And vice versa.

7 Q. And Amazon is a much larger company than Groupon,
8 would you agree with me?

9 A. Yes.

10 Q. And now let's talk about Facebook. Facebook has two
11 patent license agreements with IBM; correct?

12 A. Yes.

13 Q. And the sum total of both of those is \$20 million;
14 right?

15 A. That's correct.

16 Q. And it's also for using 40,000 plus of IBM patents in
17 whichever way in Facebook's business; correct?

18 A. And IBM gets to use 5,000 Facebook patents.

19 Q. Thank you.

20 And Facebook is also a much larger company than
21 Groupon; correct?

22 A. Yes.

23 Q. And Google, let's take Google. Google also has a
24 patent license agreement with IBM; right?

25 A. Yes.

Hausman - cross

1 Q. They paid \$35 million for it; correct?

2 A. Yes.

3 Q. And it also covers the entirety of IBM's patent
4 portfolio which is 40,000 plus patents for Google to use in
5 whichever way it needs for its business?

6 A. And IBM gets to use 28,000 Google patents.

7 Q. Thank you.

8 Let's talk about Priceline. Priceline was a
9 settlement agreement, correct, with IBM?

10 A. Yes.

11 Q. That is because IBM sued Priceline; is that right?

12 A. That's what I understand. Well, I know.

13 Q. You actually worked for IBM in that case; right?

14 A. Yes.

15 Q. So that case actually settled just about four weeks
16 before trial; isn't that right?

17 A. That sounds right, yes.

18 Q. And in that case, Priceline disputed that it
19 infringed the patents; correct?

20 A. Yes, there was no assumption of validity and
21 infringement.

22 Q. And in that case, Priceline actually claimed that the
23 four patents were invalid; correct?

24 A. Yes.

25 Q. And the settlement agreement if we interpret it

Hausman - cross

1 generously is \$40 million total, there is two sets of
2 payments, but total it's about 40 million?

3 A. That's my understanding, yes.

4 Q. And it's a cross license as well, isn't it?

5 A. Yes.

6 Q. You were deposed in the Priceline case, do you
7 remember?

8 A. Yes.

9 Q. This is what you told -- this is your testimony in
10 that case where counsel there asked you --

11 MS. STEPLER: Objection, Your Honor.

12 THE COURT: Hold on. Let's take it down for a
13 moment. What's the purpose?

14 MS. SHAMILOV: I just want to confirm that
15 that's what Dr. Hausman said.

16 THE COURT: You can ask him first.

17 MS. SHAMILOV: Okay. I can do that, sure.

18 BY MS. SHAMILOV:

19 Q. You were deposed, yes, just to backtrack a little bit
20 just for the jury?

21 A. Yes.

22 Q. In that case you were asked the value of, Priceline's
23 value of their software; correct?

24 A. Yes.

25 Q. You actually said the word bupkis; right?

Hausman - cross

1 A. That's a term of art, yes.

2 Q. And that means nothing at all; right?

3 A. Well, they had 57 patents. Pretty small?

4 Q. So that Priceline license, the value of the cross
5 license in that particular license agreement with Priceline
6 is zero; correct?

7 A. Well, close to zero, yes.

8 Q. So the value of the freedom to operate in the
9 Priceline agreement is also close to zero?

10 A. Yeah.

11 Q. And Priceline is also a much larger company; is that
12 right?

13 A. Yes.

14 Q. And so here, each of those companies paid
15 individually a lot less, including Priceline, than what
16 you're saying Groupon should pay to IBM. In fact, if we
17 just total them out, which is going to be 144.8 million,
18 that total combined is less than what you're saying Groupon
19 should pay to IBM for just four patents; is that right?

20 A. Yeah, that's correct.

21 Q. Now, I want to talk to you a little bit about the
22 apportionment analysis that you presented to the jury today.

23 A. Sure.

24 Q. And I'm going to use some of the slides. I think
25 this is one of the slides you put up in front of the jury;

Hausman - cross

1 right?

2 A. Yes.

3 Q. And so here you have 59.2 percent of cache content;
4 correct?

5 A. Yes. Yes.

6 Q. That's the number you got from Dr. Schmidt; correct?

7 A. Yes.

8 Q. That is not a result of any economic analysis, is it?

9 A. No, it's a technical analysis.

10 Q. Dr. Schmidt is not an economist; right?

11 A. Correct.

12 Q. And that is not a percentage of revenue, is it?

13 A. No, it's a percentage of use.

14 Q. And then 21 percent of returning visitors, that is
15 also not a percentage of revenue, is it?

16 A. No, that's a percentage of use of returning visitors.

17 Q. And yet you're performing a calculation on two
18 percentages that have nothing to do with revenue and
19 arriving at the result that's revenue, isn't it?

20 A. I disagree.

21 Q. Isn't that what you're showing there?

22 A. Yeah. If you take 60 percent and multiply by 20, you
23 get about 12 percent, so that's says if you look at the
24 bottom, it says revenue associated with use of the '967
25 patent, so you take 12 percent multiplied by the revenue,

Hausman - cross

1 and it's associated with the use of the patent.

2 Q. Let's look at the next slide. This is what you
3 presented to the jury for the '849 patent and, again, the
4 percentage of 59.2 percent of badges in the website and 52.7
5 of the apps, those are numbers you got from Dr. Schmidt?

6 A. Correct.

7 Q. Those are not the results of any economic
8 calculation?

9 A. No, it's the use calculation.

10 Q. And these are not percentages of revenue, are they?

11 A. That's correct.

12 Q. Neither are the 21 percent or the 21.4 percent
13 respectively there that you put for the websites and the
14 apps?

15 A. That's correct.

16 Q. And again, you multiply the non- revenue percentages
17 in arriving at the results that you say is revenue?

18 A. It's the amount of revenue that's associated with the
19 use of the patents.

20 Q. None of these percentages are incremental revenues,
21 would you agree with me on that?

22 A. I asked Groupon for incremental revenue for the use
23 of these. I asked IBM's lawyers, of course, to ask Groupon
24 and Groupon answered we don't have that data. There is no
25 way I can do it. It would have been best I'll be the first

Hausman - cross

1 to admit as an economist, but Groupon said they didn't have
2 the data so this is the best approximation I could come up.

3 Q. I'm sorry, is that a no, these are not?

4 A. These are not, but I specifically asked IBM to get
5 the data from Groupon and Groupon answered we don't have the
6 data.

7 Q. And for the '967 patent going back, these percentages
8 are also nonincremental revenue; correct?

9 A. That is correct, Groupon said they didn't have the
10 data.

11 Q. Let's look at the '601 patent. Again the 12.5
12 percent, that's the number you got from Dr. Schmidt; right?

13 A. Correct.

14 Q. Again, not a percentage of the revenue?

15 A. Right.

16 Q. Not incremental revenue; right?

17 A. Again, Groupon said it didn't have the data.

18 Q. And the same sets of questions about the '346 patent.
19 The 14 percent that you put up on the slide there, that is
20 not a percentage of revenue; right?

21 A. That's the amount it used which is associated with
22 the ten billion, approximately \$10 billion of revenue.

23 Q. I'm sorry, I didn't mean to interrupt.

24 A. That's okay.

25 Q. And that is not incremental revenue either; right?

Hausman - cross

1 A. Again, Groupon said it didn't have it.

2 Q. And, in fact, you have no evidence at all to present
3 here to tell to the jury that if Groupon did not use the
4 '346 patent, that 14 percent of its users would not be
5 signing up, do you?

6 A. No, I don't.

7 Q. Okay. Thank you.

8 Now, Groupon sells -- I think you testified
9 earlier today that Groupon on its website sells deals and
10 goods; is that right?

11 A. That's correct.

12 Q. So starting with goods, like Groupon gets revenue
13 because people want to buy the things it's selling as goods;
14 right?

15 A. That's half of it. People who are selling the goods
16 want to make profits so you need both a seller and a buyer,
17 yes.

18 Q. You were deposed in this case as well, right,
19 Dr. Hausman?

20 A. Yeah. Sure.

21 Q. I think the tab one in your binder there is your
22 deposition transcript from your case.

23 A. Okay.

24 Q. If I can have you turn to page 75, lines 20 through
25 23.

Hausman - cross

1 A. Okay.

2 Q. "Question: So starting with goods, like Groupon gets
3 revenue because people want to buy the things it's selling
4 as goods; right?

5 "Answer: At the price they're offered, yes."

6 A. Yes, that's what I said.

7 Q. And then IBM is not claiming that those goods, right,
8 those batteries or headphones, whatever Groupon is selling
9 is covered by patents; right?

10 A. That's correct.

11 Q. And if Groupon did not offer product that customers
12 wanted to buy at good prices, they would have no or little
13 revenue, right?

14 A. That's what I testified to about an hour ago, sure.

15 Q. Besides working with IBM on the Priceline case, you
16 have consulted for IBM before; right?

17 A. Well, I have consulted with them, yep, once or twice,
18 but I have also been against them.

19 Q. So you have got about what, over \$140,000 for your
20 opinions in this case for IBM?

21 A. That's for my analysis, yes.

22 MS. SHAMILOV: Thank you so much. I have no
23 further questions.

24 THE COURT: Redirect.

25 MS. STEMLER: Thank you, Your Honor.

Hausman - redirect

REDIRECT EXAMINATION

BY MS. STEPLER:

Q. Professor Hausman, counsel is asking you about your extent of use analysis. In this instance, why did you start out with the accused revenues and then apportion it down through extent of use to the revenues associated with the patents?

A. Well, what I tried to figure out is, you know, the Groupon documents says that, for instance, response time is an important way to get higher sales and higher profits. And so, you know, you take one of these patents and you can't ascribe all Groupon's profits or all Groupon's revenues, that's what I was just discussing -- I'm sorry, I missed her name, who cross-examined me, I apologize.

THE COURT: Ms. Shamilov.

A. Ms. Shamilov, excuse me, that's what I was discussing with her, you attribute it, most of it to Groupon, here we're attributing 88 percent of the revenue to Groupon and 12 percent to the use of the patent, so that's what apportionment is.

Q. When you applied your extent of use in this example it's the cached content and the returning visitors, we looked at some other examples in the other patents, did you understand that to be a reasonable estimate of the extent of use from Dr. Schmidt?

Hausman - redirect

1 A. Yes, absolutely. He did the analysis and it seemed
2 correct for me so I used it.

3 Q. Under your analysis, would your analysis make sure
4 that you only capture the revenue associated with the patent
5 and not any of the other contributions that Groupon has
6 made?

7 A. Certainly that's what I mean to do. As I said here,
8 88 percent of the revenues are associated with no use of the
9 patent, only 12 percent of the revenues are associated with
10 use of the patent for this example.

11 Q. Now, counsel also asked you about the Priceline
12 settlement agreement. In that agreement, was there an
13 assumption of validity and infringement?

14 A. No. In fact Ms. Shamilov, you know, basically
15 explained things correctly in my view. And that is that
16 Priceline was claiming that the patents were invalid, and
17 that they were not infringed, so that means that Priceline
18 had one, IBM would have gotten zero just like Ms. Shamilov
19 was having me answer. IBM, of course, thought they were
20 valid and infringed, they came to a settlement, they came to
21 a deal.

22 But here it's completely different because here
23 I'm assuming under the hypothetical negotiation that was on
24 the screen, which I'm told to do by the Court, that the
25 patents are valid and are infringed. So at least for my

Hausman - redirect

1 analysis there is nothing to argue about, you know, compared
2 to the Priceline. So I think the comparison she made at
3 least from an economist point of view is inappropriate, but
4 that's my view.

5 Q. Counsel for Groupon also asked you about a few of the
6 other licenses with Amazon, Google and Facebook. Do you
7 remember that?

8 A. Yes.

9 Q. Can you remind us why those cross license fees paid
10 are not the whole story?

11 A. Yes. I was trying to explain this and she didn't
12 allow me to, but let's take Google. So it's true that IBM
13 had 40,000 patents, but Google has 28,000 patents. And so
14 -- and Amazon has over 8,000 patents. So as I tried to
15 explain, if IBM wants to compete on the cloud or if IBM
16 wants to compete on artificial intelligence, Mr. McBride
17 spoke to that, they're going to need to use these patents,
18 so there is value going in both directions. I think her way
19 of only looking at value in one direction, I think that's
20 wrong. She's looking at half the story. You got to look at
21 both sides.

22 Q. In a hypothetical negotiation between IBM and
23 Groupon, how many patents did IBM get from Groupon?

24 A. Zero.

25 MS. STEMLER: I have no other questions for

1 this witness. I want to clarify I'm not sure there were
2 certain exhibits I meant to move into the record, I thought
3 I did, but I just received a note that I might have missed
4 some. Shall I read this?

5 THE COURT: I think to be safe.

6 MS. STEMLER: Those were Plaintiff's Exhibit
7 168 through 171, 173, 375, through 378, and 1566 through
8 1568.

9 THE COURT: And you used all of those in your
10 direct examination?

11 MS. STEMLER: Yes.

12 THE COURT: Is there any objection?

13 MS. SHAMILOV: May I see the slides just so I
14 know what -- I'm sorry. No objection.

15 THE COURT: No objection. They are all admitted
16 or readmitted. You can step down. Thank you very much.

17 (The above exhibits were admitted.)

18 THE COURT: What's next from IBM?

19 MR. OUSSAYEF: Your Honor, at this time IBM
20 would like to play another deposition clip.

21 THE COURT: Okay.

22 MR. OUSSAYEF: Ladies and gentlemen of the jury,
23 IBM is now going to play a clip from a Groupon employee. He
24 is Damien Schmitz. He is the senior director of financial
25 planning and analysis.

deposition designations - Schmitz

1 THE COURT: About how long?

2 MR. OUSSAYEF: It is three minutes and 45
3 seconds.

4 THE COURT: All right. We will turn the lights
5 down and once that's done, you can play.

6 (Videotape deposition of Damien Schmitz).

7 "Question: Would you please state your name and
8 address for the record.

9 "Answer: Certainly. It's Damien Schmitz.

10 "Question: And your title and place of
11 employment, if you will?

12 "Answer: Senior director FP&A for Groupon.

13 "Question: And FP&A is?

14 "Answer: Financial planning and analysis.

15 "Question: So what does -- what does that mean
16 to be the global director of financial planning and
17 analysis.

18 "Answer: It involves an understanding of our
19 actual financial results, as well as forward-looking
20 projections.

21 "Question: Does Groupon have any license
22 policies that it follows when it's taking a license to
23 technology from third parties?

24 "Answer: No. Groupon does not have any written
25 or unwritten licensing policies.

deposition designations - Schmitz

1 "Question: What about when it's licensing its
2 own technology to third parties? Does it have a licensing
3 policies for that?

4 "Answer: No, similarly, no written or unwritten
5 policies.

6 "Question: What industry practices does Groupon
7 follow when negotiating patent licenses?

8 "Answer: Any decision would be made on a
9 case-by-case basis.

10 "Question: Who's responsible for negotiating
11 licenses at Groupon?

12 "Answer: I believe that falls under our legal
13 team.

14 "Question: And do you know why Groupon stopped
15 using CSOI?

16 "Answer: We viewed EBITDA as a better measure.

17 "Question: And why is that?

18 "Answer: It's better aligned to the cash flow
19 as described earlier.

20 "Question: So the quarterly financial filings
21 report, the reconciliation of EBITDA to GAAP?

22 "Answer: Yes. Our management team looks at
23 adjusted EBITDA and talks to the board about it, especially
24 as that relates to cash-based health. And when we're -- we
25 also are looking at the GAAP net operating income as a

deposition designations - Schmitz

1 financial profitability metric and a health metric overall.

2 "So it's kind of -- you know, they're measuring
3 different things and they're slightly different lenses
4 overall. So we look at both.

5 "Question: So other than the adjusted EBITDA
6 and the GAAP net operating income, are there any other
7 measures that Groupon considers to be accurate measures of
8 its financial status?

9 "Answer: Additionally, in our annual report
10 filings we'll -- we have other metrics that are used to
11 provide information on Groupon and our overall status,
12 whether those are -- some of which are units sold, some of
13 which is number of deals. Historically, some of that
14 information was provided. We also look at our active
15 customers.

16 "Question: So as of 2016, Groupon was reporting
17 that adjusted EBITDA was a key measure to evaluate its
18 performance of its business; right?

19 "Answer: Yes.

20 "Question: And does Groupon still believe that
21 today?

22 "Answer: Yes, and it's reported in our -- to
23 our board of directors as well as disclosed in our quarterly
24 earnings."

25 (End of video deposition.)

1 MR. DESMARAIS: Thank you, Your Honor. That
2 concludes IBM's opening case.

3 THE COURT: Okay. Thank you very much.

4 MR. DESMARAIS: Thank you.

5 THE COURT: We'll turn to Groupon.

6 MS. SHAMILOV: Your Honor, we have some motions
7 to make.

8 THE COURT: Sure. We'll take up those motions
9 at the next opportunity.

10 MS. SHAMILOV: Our first witness will be Mr.
11 Carlisle, but I'm not sure. Do we have issues?

12 THE COURT: Are there any issues?

13 MR. DESMARAIS: No, Your Honor.

14 THE COURT: So you may call Mr. Carlisle and
15 let's turn the lights back on.

16 MS. SHAMILOV: Ladies and gentlemen, our first
17 witness will be Mr. Jason Carlisle. And he is the VP of
18 marketing at Groupon.

19 ... JASON CARLISLE, having been first duly
20 sworn, was examined and testified as follows ...

21 THE COURT: Welcome. And good afternoon, Mr.
22 Carlisle.

23 THE WITNESS: Hi. Thank you.

24 THE COURT: Ms. Shamilov.

25 MS. SHAMILOV: Thank you, Your Honor.

Carlisle - direct

1 DIRECT EXAMINATION

2 BY MS. SHAMILOV:

3 Q. Good afternoon. Can you please introduce yourself to
4 the jury?

5 A. Good afternoon. I'm Jason Carlisle. I'm the Vice
6 President of Marketing at Groupon.

7 Q. Where do you live?

8 A. I live in Seattle, Washington.

9 Q. Did you grow up in Seattle, too?

10 A. I did grow up in Seattle for the most part. My dad
11 was in the military, so we moved around a lot until about
12 the Fifth Grade, but settled down in Seattle and grew up
13 there with my two brothers and still live just a few blocks
14 from the house I grew up in.

15 Q. Mr. Carlisle, we have the court reporters here. If
16 you could slow down just a tad, it will make his life less
17 difficult.

18 A. Sure.

19 Q. Did you venture out of Seattle for college at all?

20 A. Actually, I did not. I studied in Seattle. I went to
21 the University of Washington and received a degree in
22 English.

23 Q. How long have you been with Groupon?

24 A. I've been with Groupon since 2012, so about six years.

25 Q. What is Groupon?

Carlisle - direct

1 A. Groupon is an online marketplace for local business.
2 And we have -- you can access it through the website or
3 through the mobile app.

4 Q. And is this an image of Groupon's website?

5 A. Yes, it is.

6 Q. And do all users across the country see the same
7 website?

8 A. No, you see different things based upon where you
9 are. So here, this is actually an example from some
10 Wilmington businesses that shows a Mexican restaurant, you
11 see a gym, a massage, some hotels. And these are all local
12 businesses here in Wilmington.

13 Q. So if I were in Seattle, I would see something
14 different?

15 A. That's right. If you are in Seattle, you are going
16 to see things that are more relevant to the Seattle customer
17 base. So here, you see a Seattle hotel, family fun center,
18 Seattle Mariners game, a tanning salon. Things that are
19 local businesses there in Seattle.

20 Q. Why does Groupon change its website depending on
21 where it is seen?

22 A. So part of our goal at Groupon is to connect
23 customers with local businesses in their community, so
24 Groupon has a platform that helps both customers and local
25 businesses.

Carlisle - direct

1 Q. How does Groupon's platform help local businesses?

2 Can you tell us a little bit more about that?

3 A. Sure. So most of the businesses that work with
4 Groupon are small businesses. Ninety percent have less than
5 20 employees, and a third are -- almost a third are sole
6 proprietors. So Groupon really helps these small businesses
7 compete with some of the giants out there like the Amazon
8 and the eBays. Most small businesses don't have the
9 resources to do that. So Groupon provides a platform that
10 helps these businesses reach customers and retain new
11 customers.

12 Q. What about for the customers? How does it help them?

13 A. Yes. So the customers, they like Groupon because it
14 provides them with discounts on the deals that we sell on
15 Groupon. And, you know, they like the deals and they like
16 to discover new things to do in their community.

17 Q. And how do they discover things in the community?

18 How do customers discover things in the community?

19 A. So when you are browsing Groupon, you can see the
20 different deals that are available to you. It might be
21 something that you hadn't considered otherwise. And so you
22 go check out those deals and look for things that appeal to
23 you.

24 Q. Why did you decide to join Groupon?

25 A. So I joined Groupon actually because a friend of mine

Carlisle - direct

1 started working there. I hadn't considered it prior to
2 that, but then as I looked into it, I really liked how, you
3 know, not only was it a strong technology company but also
4 it had a good mission I felt like where we wanted to really
5 help consumers and help local businesses.

6 Q. Was there anything specific about Groupon helping
7 local businesses that drew you to Groupon?

8 A. Yeah. I guess, you know, when I was growing up,
9 after high school, I worked for a few small companies. I
10 worked for a mom-and-pop furniture shop and a small
11 furniture company and was able to see firsthand just how
12 hard it is for these small businesses to succeed. So
13 working for Groupon, I fell like it was an opportunity not
14 only to work for a tech company but to work for one that
15 really wanted to empower these small businesses.

16 Q. When did Groupon launch its platform?

17 A. So I wasn't around when Groupon started, but I know
18 the history. And Groupon started in 2008, launched its
19 website out of Chicago.

20 Q. And why was Groupon's first deal in 2008?

21 A. This is actually a picture of it right here. This
22 is a pizza restaurant that was in the same building as
23 Groupon's headquarters.

24 Q. And when Groupon launched in 2008, were there other
25 companies who were doing kind of similar things to Groupon?

Carlisle - direct

1 A. Groupon was actually the first company of its kind to
2 start a local marketplace for small businesses.

3 Q. Did others follow?

4 A. Yeah, there were several companies that tried a
5 similar business models, but none of them had really
6 succeeded the way Groupon has.

7 Q. Why is that?

8 A. I can't say exactly why they failed. But I do know
9 that what we do is not easy. It's hard to get the types of
10 deals that consumers want to buy and to find merchants to
11 fill up that marketplace, and connecting those and putting
12 that all together in every city that we operate in is a very
13 difficult thing to do.

14 Q. How does Groupon accomplish that?

15 A. So Groupon invests a lot of resources to help make
16 that happen. They -- we have a large technology team that
17 is making sure by building out the platform and making sure
18 we stay on top of all the technological advances. We have a
19 large team that works with merchants, and they're out there
20 making sure that their merchants are reputable, helping
21 them with merchants, helping the merchants structure their
22 deals so they can be successful on the Groupon platform, and
23 then putting all that together in a way that it appeals to
24 consumers. That's a difficult thing to do. So that's our
25 focus.

Carlisle - direct

1 Q. How many merchants have signed up to sell their
2 products on Groupon?

3 A. Groupon has worked with over 1 million merchants
4 worldwide.

5 Q. What about customers? How many customers do you have
6 at Groupon?

7 A. We have over 31 million customers in North America
8 right now. And those are people who have bought something
9 from Groupon in the last 12 months. And it's kind of cool
10 to see. Most places I go now, there is someone who has
11 heard of Groupon or has bought something on Groupon. You
12 can see it coming up in local media.

13 Q. What do you mean it's coming up in local media?

14 A. I can give you tan example. The other day was
15 Father's Day so I was, you know, sleeping in a little bit.
16 My kids were making breakfast, and I was reading the local
17 newspaper in Seattle, and it was a cartoon where the dad was
18 getting, given the gift of some swim shorts. And the family
19 went to the lake and went for a swim at the lake. And all
20 the other dads that were on the beach were wearing the same
21 swim shorts. And the dad says to the wife: Did you get
22 this deal on Groupon? And so I thought it was interesting
23 to see it come up. It gave me a little chuckle.

24 But it's also nice because it expresses
25 Groupon's mission, which is be a daily habit in local

Carlisle - direct

1 commerce where we want customers, no matter what they want
2 to buy, whether it's a restaurant or spa or gym or to buy a
3 gift, that they can go to Groupon and get what they need.

4 Q. And is that the funny cartoon you just mentioned?

5 A. Yeah, that's the one.

6 Q. Now, what kind of -- what types of deals can
7 customers purchase through Groupon?

8 A. So if you go to Groupon's website, up at the top you
9 can see the categories, you can browse by category.

10 Q. I'm sorry. Is that it?

11 A. Oh, yeah. That is what you are showing here.

12 So the local deals, those are the deals that are
13 in your neighborhood. So things like restaurants, spas,
14 things to do, activities. Those are the local businesses
15 that are on Groupon.

16 And goods, those are the physical goods we sell.
17 Things you ship to your house, like beach chairs or luggage,
18 those types of things.

19 And getaways, that is where we have our travel
20 deals. These are things like hotel stays or cruises,
21 vacation packages.

22 And then we have a couple of other promotional
23 sections here, like deals of the day and best sellers.

24 Q. And I used the word deal, so did you, and I think the
25 jurors heard that word over and over again. What are deals?

Carlisle - direct

1 A. So deals are what Groupon sells. Deals are the
2 products and services that are on Groupon's platform, and
3 that's where Groupon sells them at a discount. That is why
4 we call them deals.

5 Q. And are deals advertisements?

6 A. No, they're not advertisements.

7 Q. Why are they not advertisements?

8 A. They're not ads because that's actually what Groupon
9 is selling. We're like any other e-commerce platform that
10 is out there where the products and services that we sell
11 are the deals and they're on the site. Ads are something
12 that is usually peripheral. Customers aren't going to the
13 site to see ads. They're usually the banners that you see
14 on websites. We have probably all seen them. And they --
15 or actually, yes, you have just shown an example.

16 Q. Yes. Okay. Does Groupon's website actually include
17 the banner ads? I think that is what you called them.

18 A. Yes, so we do have some ads on the site. Here is an
19 example where the deal cards, that is what you see on the
20 right, this is most of the content here. But the
21 advertisement is that restoration hardware there out there
22 on the left. And if you click on that, you actually go
23 outside of Groupon to that advertiser's website. And that
24 is a big part of what distinguishes the ad from the content
25 and the things that we sell.

Carlisle - direct

1 Q. Can you tell us a little bit about certain things
2 that users can see on the website, customers can see on the
3 website that may help them discover a new deal?

4 A. Sure. So Groupon tries to put a lot of things out
5 there on the site to help customers to decide if a deal is
6 good or not. For example, here we have reviews for the
7 deal. I think this particular deal has almost 2,500
8 ratings, and it has got 4 and-a-half stars. You can click
9 on the ratings and see what. These are verified purchasers.
10 These are actually people who have bought this deal and it
11 shows what they have said about the particular deal.

12 We also have large images that we show for each
13 merchant that works with Groupon. For the consumer, it
14 makes sense of what they would get if they were to shop at
15 this particular merchant.

16 And, you know, we show how many have sold and
17 those types of things. And that is the information that we
18 provide to customers to give them a sense of whether or not
19 they want to buy at Groupon.

20 Q. And do merchants also generally like using Groupon's
21 platform?

22 A. Yes, merchants really like Groupon's platform. It's
23 a strong source of new customers for them, and they have
24 success retaining the customers. In fact, 80 percent,
25 nearly 80 percent of the customers that try Groupon say they

Carlisle - cross

1 plan to revisit the merchants that they visit.

2 Q. Do you have a story of a local merchant that might
3 have shared, you might have heard of?

4 A. Sure. So just a few weeks ago, I bumped into an old
5 friend and his wife. We started talking and his wife works
6 for a company in Seattle called Eat Local. And the company
7 makes healthy frozen foods and, in addition, they cook.
8 They do cooking classes. And so it was, you know, I started
9 talking to her, and she asked me what I do. And I said I
10 work for Groupon. And she says ah. You know, we get over
11 half the customers for our cooking classes from Groupon. So
12 it was really cool to see my company helping her company
13 grow.

14 MS. SHAMILOV: I don't have any further
15 questions at this moment. Thank you.

16 THE COURT: Okay. Cross-examination.

17 MR. DESMARAIS: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. DESMARAIS:

20 Q. Good afternoon, Mr. Carlisle.

21 A. Good afternoon.

22 Q. So you would agree with me, wouldn't you, that
23 Groupon is a pretty big company now; right?

24 A. Yes, I would say Groupon is a pretty big company.

25 Q. Over 6,000 employees worldwide; right?

Carlisle - cross

1 A. That's correct.

2 Q. And you told us 34 million users in the U.S. this
3 year, but if you look worldwide, it's even much bigger than
4 that; right?

5 A. I think I said 31 million, but yes.

6 Q. I'm sorry. I misheard you. And you showed us some
7 photos from your website. This is one of the slides you
8 just showed us; right?

9 A. Yes, that's correct.

10 Q. And you see on the top, it has this command bar
11 where you can click on things and go to different channels
12 on Groupon?

13 A. Yes.

14 MS. SHAMILOV: Objection.

15 THE COURT: What is the objection?

16 MS. SHAMILOV: This is lacking.

17 THE COURT: He asked the question and he got the
18 answer. Overruled. Go ahead.

19 BY MR. DESMARAIS:

20 Q. Now, you would agree with me, wouldn't you, that
21 the idea of a command bar that you can click on to go to
22 different applications for different channels, Groupon
23 didn't invent that idea; right?

24 A. That's correct.

25 Q. On your website, you see the images, that we see the

Carlisle - cross

1 photographs?

2 A. Um-hmm.

3 Q. Those get stored in the local cache on the user's
4 computer; right?

5 A. I'm not sure exactly how each user's computer works.

6 Q. But you would agree with me, Groupon didn't invent
7 how to download images or advertising and store it on the
8 local cache; right?

9 A. We did not invent that. I think that is embedded in
10 a lot of browsers.

11 Q. Now, on these command bar, you have at the top where
12 you can click and go to the different applications or
13 channels. That allows you to do random movement between all
14 those different channel; right?

15 A. Yes.

16 Q. And you didn't invent at Groupon the notion that you
17 could click on icons and randomly move through different
18 channels, did you?

19 A. We weren't the first people to do that. I have seen
20 other companies do that.

21 Q. And Groupon has what people call social-sign-on or
22 single-sign-on, right? Where you can sign on through
23 Facebook or sign on through Google, right?

24 A. When you say sign on?

25 Q. Or sign up.

Carlisle - cross

1 A. Or sign up, yes.

2 Q. You have that, right?

3 A. Yes.

4 Q. And you would agree with me, Groupon didn't invent
5 that, right?

6 A. Yes.

7 Q. But you would also agree with me all these things
8 that Groupon didn't invent, Groupon is using; right? You
9 are using the command bar. You are storing images on cache.
10 You are doing sign up with Google and Facebook; right? You
11 are doing all these things?

12 A. Yes.

13 Q. But you are just using them and you didn't invent
14 them; right?

15 A. Yes. We're using them like most e-commerce
16 companies.

17 Q. Now, let's talk a little bit about a timeline I used
18 in my opening.

19 Now, you know, don't you, that Groupon has been
20 on notice of --

21 MS. SHAMILOV: Objection, Your Honor. These are
22 all facts stipulated in the record that are uncontested
23 facts.

24 THE COURT: They're uncontested facts and?

25 MS. SHAMILOV: When Groupon was on notice. I

Carlisle - cross

1 don't know how this relates. There is no disputed facts and
2 it was outside the scope of my direct examination.

3 THE COURT: Mr. Desmarais, do you want to
4 respond?

5 MR. DESMARAIS: Yes. I was just following up on
6 the questions that I just had with the witness about Groupon
7 using technology invented by others on the website, and I
8 just want to follow the timeline of the interactions between
9 these two parties. He is the corporate representative.

10 THE COURT: I'll see you all at sidebar.

11 Bear with us, ladies and gentlemen.

12 (Sidebar conference held.)

13 THE COURT: Your response confuses me because I
14 think it is pretty clear at this point pre-suit
15 communications between the parties are not part of the
16 trial; isn't that correct?

17 MR. DESMARAIS: I wasn't asking her about the
18 communications.

19 THE COURT: You just said I'm going to ask
20 him about the interactions or communications between the
21 parties. I think that is what you said.

22 MR. DESMARAIS: I didn't mean pre-suit. I did
23 not mean pre-suit communications.

24 THE COURT: So what is the relevance or where
25 are you going there?

Carlisle - cross

1 MR. DESMARAIS: I was going to ask him what is
2 Groupon's patent policy, patent licensing policy which is
3 already in the record, and I'm going to ask him about
4 whether they designed around, which they're pursuing in this
5 case. And then I'm not going to ask him anything about the
6 interactions between parties during this time.

7 MS. SHAMILOV: How is this cross-examination? I
8 didn't go into any of this area in my direct. There is
9 nothing in my direct that this relates to at all.

10 THE COURT: How is it not beyond the scope of
11 her direct?

12 MR. DESMARAIS: He is the face of the company
13 Groupon. He is being put up as the corporate
14 representative. I'm not going far beyond the direct. She
15 was asking him about who was Groupon, and what did they do,
16 and how did they do it. And all I'm asking was are they
17 doing it with a license or not.

18 MS. SHAMILOV: I just asked him about what
19 Groupon's business is. He is not a corporate
20 representative. He is fact witness. Direct examination was
21 limited to what is Groupon generally business-wise. I did
22 not open the door at all to anything regarding licensing or
23 design-around the patent that we're asserting in the case.
24 I didn't mention the word patent.

25 THE COURT: So I don't know, and you can tell me

Carlisle - cross

1 who also is going to be coming, but it would seem to be a
2 relevant fact Groupon, as an entity, whether they have a
3 licensing policy, whether they tried to design-around. Is
4 he not --

5 MS. SHAMILOV: Well, here is going to be the
6 issue.

7 THE COURT: Yes.

8 MS. SHAMILOV: They already played multiple
9 depositions, including Mr. Schmitz on the video because we
10 don't have licensing policies. It is uncontested fact read
11 in the record earlier today that says Groupon does not have
12 licensing policies. They also read a Groupon interrogatory
13 response that says we don't have a licensing policy and we
14 determine it on a case-by-case basis. That is all in the
15 record.

16 THE COURT: Right. But hold on. Hold on.
17 Sure, but there is no limitation on how many people I think
18 get the same evidence.

19 MS. SHAMILOV: That's fine, but this is a VP
20 of Marketing. They didn't ask a single question about
21 patent licensing. First, outside his knowledge. He wasn't
22 designated on that topic during discovery. I didn't ask
23 him a single question about that. And now this is what is
24 going to happen?

25 They are going to now imply that they put up

Carlisle - cross

1 this timeline, and the argument in the opening was we told
2 them about these patents, they actually read interrogatory
3 today that said Groupon became aware of this patent via
4 communication from IBM. So the implications that are being
5 drawn that we told you about these patents and you did not
6 design-around it. And so in the closings, I guarantee you,
7 counsel is going to get up and say you heard all that and
8 they allowed the patent. They didn't design-around. And in
9 the opening, so easy they should have done it, and yet at
10 the same time they get up and say cannot rely on NDAs;
11 right? They say I shouldn't. Right.

12 THE COURT: Your position on the NDA is clear.

13 MS. SHAMILOV: I understand, but this is where
14 it is going; right? It is related to that. They're going
15 to use the timeline, and this is completely outside. I mean
16 I was very precise in my direct.

17 THE COURT: Okay. Do you want to respond?

18 MR. DESMARAIS: Your Honor, it's a very limited
19 line of inquiry. They're putting design-around in the
20 record. I have to respond to it. If they're not going to
21 pursue they had an ability to design-around, then I don't
22 have to prove that they didn't design-around, but I think if
23 they're pursuing noninfringing alternatives, I have to
24 respond.

25 MS. SHAMILOV: Noninfringing alternatives, Your

Carlisle - cross

1 Honor, is not a factual issue. It's an expert opinion.
2 We're going to have an expert here discussing about his
3 analysis of noninfringing alternatives.

4 THE COURT: All right. I'm overruling the
5 objection. This is within the scope of direct. You have
6 a corporate witness. He has talked about who Groupon is. He
7 talked about some of the things he wants to highlight about
8 who Groupon is. The other side is free to explore other
9 aspects of who Groupon is, and you will have a chance on
10 redirect.

11 MR. DESMARAIS: Thank you, Your Honor.

12 (Sidebar conference ends.)

13 THE COURT: You may proceed when you're ready.

14 MR. DESMARAIS: Thank you, Your Honor.

15 BY MR. DESMARAIS:

16 Q. Now, you agree, Mr. Carlisle, don't you, that Groupon
17 has been on notice of IBM's patents prior to this lawsuit;
18 right?

19 A. I don't know about that.

20 Q. Well, you do know that IBM and Groupon did not
21 conclude a license agreement and that's why we're in a
22 lawsuit; right?

23 A. Yes, I guess so.

24 Q. And you're in the marketing department at Groupon;
25 right?

Carlisle - cross

1 A. That's correct.

2 Q. So I won't ask you about the individual patents, but
3 you do know, don't you, that as we stand here today, Groupon
4 has not tried to design around IBM's patents; right?

5 A. What do you mean by design around patents?

6 Q. I'll move on.

7 You do know that Groupon does not have a policy
8 at Groupon about how to deal with licensing patents from
9 outsiders, right, like IBM?

10 A. Groupon has a legal team that deals with our patents.

11 Q. But you do know that even the legal team doesn't have
12 a licensing policy for dealing with third-party patents;
13 right?

14 A. What do you mean by licensing policy? Sorry.

15 Q. I'll move on.

16 You at least agree, don't you, that patents are
17 important; right?

18 A. Yes.

19 Q. And you agree as a general matter that people should
20 respect intellectual property rights; right?

21 A. Yes.

22 Q. And you even think it's fair that a patentholder like
23 IBM should be allowed to collect royalties if someone is
24 infringing their patents; right?

25 A. Yes. If someone is infringing on their patents, yes.

Carlisle - cross

1 Q. Now, one of the patents in this case relates to the
2 concept of a runtime account creation using a single-sign-on
3 or single-sign-up. Do you know that, do you know that's one
4 of the patents in the case?

5 A. Yes.

6 Q. And Groupon's products, the website that you just
7 told us about, is in fact set up to automatically create
8 user accounts at runtime either through a Facebook or
9 Google; right?

10 A. Automatically create user accounts, what do you mean
11 by that?

12 Q. You know what an account is at Groupon; right?

13 A. Yeah. But when you say automatically, I just want to
14 -- users come into our system and create accounts, so I
15 wanted to understand what you mean by automatic.

16 Q. Let's step back. Let's talk about Groupon's core
17 products and make sure we're talking about the same thing.
18 If we look although one of the slides I used in my opening,
19 slide 31. Would you agree with me that Groupon's core
20 products are the website, the mobile website, the mobile
21 apps for Apple iOS and the mobile app for Android, you would
22 call those the core Groupon products; right?

23 A. Yes.

24 Q. And if we look at another slide I used in my opening,
25 and in fact Professor Hausman I think just used it, from

Carlisle - cross

1 those core products, the way Groupon makes money is it
2 brings consumers who want discounted deals together with
3 merchants who are offering discounted deals; right?

4 A. That's right, when consumers purchase goods from
5 Groupon, that's how Groupon makes money.

6 Q. Right. When there is a purchase, Groupon takes a
7 piece of that transaction for Groupon; right?

8 A. There is a commission that is paid on most Groupon
9 merchants, yes.

10 Q. And it's true, isn't it, that before the user or
11 what's said up there consumer, but the consumer is the user?

12 A. Sure.

13 Q. Before the consumer or user can purchase anything
14 from Groupon on the core products of Groupon, the user needs
15 to have an account at Groupon; right?

16 A. Correct.

17 Q. So in general for Groupon to make money through this
18 method off its core products, users need to create a Groupon
19 account; right?

20 A. Yes.

21 Q. And so Groupon wants to encourage people to actually
22 sign up and create accounts; right?

23 A. Yes.

24 Q. And one of the ways that Groupon does that to
25 encourage users and customers to sign up and create accounts

Carlisle - cross

1 is to make that signup process easy for them; right?

2 A. Yes.

3 Q. In fact, making signup easy is very important at
4 Groupon, isn't it?

5 A. From a marketing perspective we want our site to be
6 easy to use, yes.

7 Q. In fact, I think you told us at one point that you
8 want to make signup as simple as possible; right?

9 A. Yes.

10 Q. And one of the ways that Groupon makes the signup as
11 simple as possible in your core products is that you allow
12 the users to create accounts using Facebook, Google and
13 Google Plus; right?

14 A. Yes, we do.

15 Q. And that's that screen that the jury has seen where
16 it's a Groupon screen that you can either choose to create
17 an account or you can click on sign me up with Facebook or
18 sign me up with Google; right?

19 A. I haven't seen that screen in trial here, but what
20 you're describing is our login screen exactly, so yes.

21 Q. And the reason Groupon does that is it makes the
22 creation of an account simple for users; right?

23 A. Yes.

24 Q. And it alleviates the user's need to get yet another
25 user name and yet another password right before they go on

Carlisle - cross

1 to Groupon and have an account?

2 A. That's the reason we have that.

3 Q. And that improves your customer user experience,
4 doesn't it?

5 A. To the users who chose to use that, yes.

6 Q. And the customers find value in that, don't they, in
7 this automatic signup?

8 A. People want the website to be easy, yes.

9 Q. In fact, isn't it true that signing up through
10 Facebook and Google is one of the more popular ways your
11 users sign up for Groupon; right?

12 A. I don't know the stats on that, how many people use
13 that method versus the conventional method.

14 Q. I didn't ask you how many, what I asked you is it's
15 one of the most popular ways your users sign up to Groupon,
16 isn't it?

17 A. Yeah, but I don't know if it's the most popular.

18 Q. I didn't say the most popular, it's one of the most
19 popular?

20 A. There is only two ways to, sure.

21 Q. It's popular with your users, isn't it, sir?

22 A. How do you define popular?

23 Q. Well, you gave a deposition in this case; right?

24 A. Okay. Yes.

25 Q. And at your deposition, didn't you say it's very

Carlisle - cross

1 popular with our users?

2 A. I may have used that term, yes.

3 Q. So that's the way I'm using it.

4 A. Okay.

5 Q. So let's try it again. It's true, isn't it, sir,
6 that signing up in this way is very popular with the Groupon
7 users?

8 A. Yes.

9 Q. In fact, you get more than two times sales from those
10 folks, don't you?

11 A. I don't know.

12 Q. Let me get some exhibits for you.

13 Please turn if you would in the binder to what's
14 marked as PX-0059. Are you there, sir?

15 A. Yes.

16 Q. This is a login/sign up prompts document from
17 Groupon; true?

18 A. Just give me a moment. (Witness reviewing.) Yes.

19 MR. DESMARAIS: Your Honor, I offer PX-59.

20 MS. SHAMILOV: No objection.

21 THE COURT: It's admitted.

22 MS. SHAMILOV: I believe it's already admitted.

23 THE COURT: Well, we'll admit it again.

24 MR. DESMARAIS: Thank you.

25 (PX-59 was admitted into evidence.)

Carlisle - cross

1 BY MR. DESMARAIS:

2 Q. So this is a login/sign up prompts document at
3 Groupon; right, sir?

4 A. Yes.

5 Q. And it says right in the first sentence, logged in
6 users have a higher purchase rate compared to those who are
7 not logged in, more than two times. Is that right, sir?

8 A. Yes. That's what it says.

9 Q. Would you turn to what's in your binder as PX-992.
10 This is a Groupon users team status update. Do you see
11 that?

12 A. Yes.

13 Q. And you spent some time running the users team,
14 didn't you?

15 A. No.

16 Q. You were in the users team?

17 A. No.

18 Q. Do you know what this document is?

19 A. I'm not familiar with this document.

20 Q. Okay. Let me see if I can refresh you on some
21 statistics, and if not, we'll move on. Take a look at page,
22 at the bottom that ends 355. Do you see where it says
23 Google login?

24 A. Yes.

25 Q. It says pre/post launch metrics for Google login

Carlisle - cross

1 North America, suggest a 1.6 percent lift in orders on
2 Touch, a .5 percent on desktop and Android, resulting in an
3 annualized NOB lift of 22.4 million overall. Do you see
4 that?

5 A. Yes.

6 Q. That's \$22.4 million lift from Google login at
7 Groupon; right?

8 A. That's what it says here, yes.

9 Q. And this was just shortly after Groupon implementing
10 Google login; right?

11 A. I'm not familiar with the time, no.

12 Q. Take a look at the page ending 361. Do you see how
13 it says week ending February 19th, 2016?

14 A. Yes.

15 Q. And then up at the top of next page it says Google
16 login is enabled for a hundred percent of North American
17 users on mobile and web. Do you see that?

18 A. Which page are you on?

19 Q. The top of the very next page, Google login.

20 A. Yes, I see it.

21 Q. Google login enabled for a hundred percent of North
22 American users on mobile and web, do you see that?

23 A. Yes.

24 Q. That was February 19th, 2016; is that right?

25 A. Yes.

Carlisle - cross

1 Q. If we flip back to where we were just reading, that
2 is May 13th, 2016, a few months later; right?

3 A. Yes.

4 Q. So after having added Google login to the website in
5 the apps, so post, pre/post launch metrics for Google login
6 North America suggest a 1.6 percent lift in orders on Touch.
7 That Touch is when you're using the website on the phone;
8 right?

9 A. Yes, using the website, not the app.

10 Q. A .5 percent lift on the desktop and Android; right?

11 A. Yes.

12 Q. Resulting in an annualized NOB lift of \$22.4 million
13 overall; right?

14 A. Looks like that's what they were projecting, yes.

15 Q. Just for adding signup with Google; right?

16 A. That's what it says here.

17 Q. Not even counting the signup with Facebook which was
18 also being done on Groupon; right?

19 A. Yes.

20 Q. This was just four months, or however, a few months
21 after it was installed; correct?

22 A. Yes.

23 Q. It's a pretty valuable idea for Groupon, isn't it?

24 A. That's what it says, yes.

25 Q. Do you know how big the lift was when you added

Carlisle - cross

1 Facebook?

2 A. No, I don't.

3 Q. Now, one of the other patents in the case relates to
4 preserving state information in a conversation between the
5 user and a server. You're aware of that; right?

6 A. Yes.

7 Q. And you're also familiar with the fact that you can
8 preserve state information with something called cookies;
9 right?

10 A. Yes.

11 Q. And Groupon uses cookies on the website that you told
12 us about; is that right?

13 A. Correct.

14 Q. It doesn't use cookies exclusively, does it?

15 A. What are you talking about? Sorry.

16 Q. Groupon doesn't use cookies exclusively on its
17 website, does it, for preserving state information?

18 A. Exclusive, I don't understand your question. Sorry.

19 Q. Let me rephrase.

20 You know, don't you, that Groupon has made a
21 decision to not rely solely on cookies and it also uses
22 other methods to preserve state information on the website
23 on their users?

24 A. I'm not familiar with all the methods that Groupon
25 uses to preserve state information.

Carlisle - cross

1 Q. Listen carefully to my question because I'm not
2 asking you about all the methods. What I'm asking you is
3 you know, don't you, that Groupon has made the decision to
4 not rely solely on cookies, it uses other methods to
5 preserve state information on its website and on its mobile
6 apps?

7 A. I'm not very technical, so I don't know how we could
8 elect the methods that we preserve state information. I
9 assume we won't rely a hundred percent on cookies because
10 many users don't have them or don't allow them.

11 Q. I'm not asking you a technical question. And we can
12 refer to your deposition if you want me to refresh you. I'm
13 asking you just the question, and I'll ask it one more time
14 and then we'll look at the dep.

15 You know, don't you, that Groupon has made the
16 decision to not rely solely on cookies, it uses other
17 methods to preserve state information, isn't that a fact?

18 A. It sounds reasonable, yes.

19 Q. In fact, you know that Groupon actually found a
20 better user experience if it kept track of the user's
21 identities using methods other than cookies, you know that,
22 don't you?

23 A. No, I don't believe that I do. I'm not sure, what
24 methods are you talking about?

25 Q. Should we look at your deposition? Do you remember

Carlisle - cross

1 testifying about this at your deposition?

2 A. I am drawing a blank on the specific method you're
3 talking about, sorry.

4 Q. I'm not -- I don't want to get into technical stuff
5 with you, I'm just asking you what you told us at your
6 deposition. Let me try one more time.

7 A. Okay. You said other methods and I want to know what
8 method you're talking about if it's twice as good.

9 Q. In fact, here is the question. If you can't answer
10 it just tell me and we will look at the deposition.

11 In fact Groupon actually found a better user
12 experience if it kept track of user's identifies using
13 methods other than just cookies. Isn't that true?

14 A. That may be true. I don't remember saying that, but
15 it may be true.

16 Q. Let's take a look at your deposition. You have it in
17 the book in front of you, and it's page 119, starting at
18 line 14.

19 MS. SHAMILOV: Objection, Your Honor.

20 THE COURT: What's the objection?

21 MS. SHAMILOV: Counsel is planning to put the
22 deposition transcript in front of the witness, and the
23 witness has confirmed that was done.

24 THE COURT: So page 119, what lines?

25 MR. DESMARAIS: 14 through 20.

Carlisle - cross

1 THE COURT: 14 through 20 and the objection is
2 what?

3 MS. SHAMILOV: Counsel is planning to put the
4 transcript in front of the witness to confirm that that's
5 what he said. That's what I tried to do with Professor
6 Hausman and it was objected and I was not allowed to put the
7 transcript in front of the witness.

8 THE COURT: What is the basis of your objection
9 at this point?

10 MS. SHAMILOV: There is no impeachment. He
11 didn't ask the question, this is not an impeachment
12 question. There is no question pending.

13 THE COURT: I thought we just went through his
14 recollection, but Mr. Desmarais, let's start over. Ask the
15 question again.

16 MR. DESMARAIS: Yes, Your Honor.

17 BY MR. DESMARAIS:

18 Q. It's true, isn't it, Mr. Carlisle, it's true, isn't
19 it, that quote, Groupon actually found a better user
20 experience if it kept track of user's identifies using
21 methods other than just cookies, close quote, that's true,
22 isn't it, sir?

23 A. That's what I said, yes.

24 Q. Okay. And Groupon wants to make it easy for
25 customers to browse and then select and then push the buy

Carlisle - cross

1 button on its core products, right, that process needs to be
2 streamlined and efficient for users; right?

3 A. Yes, we want customers to be able to find our
4 products.

5 Q. And in that buy button, when the user gets to the end
6 and they're going to buy, Groupon embed state information in
7 that button when it gets back to the server, the server
8 knows what the user wants to purchase, what the option is,
9 you know, what they selected; right?

10 A. I'm not, again, I'm not technical, so I don't know
11 how we embed the information, but when you click the buy
12 button, we want to know what products are being purchased.

13 Q. Do you know that Groupon uses the pledge ID in that
14 part of the system when they click the buy button?

15 A. The pledge ID.

16 Q. Yes.

17 A. I'm not familiar with the pledge ID.

18 Q. Okay. But you do know, don't you, that ease of
19 checkout and tracking that consumer's choice at checkout is
20 important to Groupon and it is important to the customer.
21 You do know that, though; right?

22 A. Yes, we want checkout to be easy.

23 Q. Now, one of the other patents in this case is a
24 method of presenting applications in an interactive service.
25 You are aware that that is one of the patents in the case,

Carlisle - cross

1 right?

2 A. Presenting applications in an interactive service,
3 yes.

4 Q. And you don't doubt that Groupon is an interactive
5 service; right? You interact with customers and they
6 interact with merchants and it's an interactive service?

7 A. It depends on how you interpret interactive service
8 but, yes, we do interact with customers. Customers interact
9 with Groupon's website and services.

10 Q. And in that interaction, you would agree, wouldn't
11 you, that the ability to store data such as text files and
12 images and advertising on the user's machine in the browser,
13 in the cache, that would help decrease the amount of time it
14 takes to load the pages or the app; right?

15 A. Yes.

16 Q. And Groupon does that. It employs the cache to help
17 its core products load faster. You know that; right?

18 A. Yes, I believe all websites do.

19 Q. Groupon does it because it knows its users want the
20 websites and the apps to work fast; right?

21 A. Yes. From a marketing experience, we want our
22 website to be quick and responsive to customers.

23 Q. In fact, you want them to work as fast as possible;
24 right?

25 A. I want them to be quick. Yes.

Carlisle - cross

1 Q. Because if they don't load quickly, you know as a
2 marketing guy that your users get frustrated and then they
3 leave the web page and they don't buy from Groupon; right?

4 A. Yes.

5 Q. In fact, you would go so far as to say that the
6 faster you're able to load the pages on the website and on
7 the apps, the more revenue Groupon makes from the visitors
8 who are looking at the pages; right?

9 A. I want pages to be fast, and the faster they are --
10 we make more money by being responsive. Yes.

11 Q. Yes. There is a direct relationship in your view
12 between the fastness of the loading of those pages and the
13 revenue Groupon makes; right?

14 A. Yes.

15 Q. In fact, Groupon actually studies how much more money
16 it can make based on how fast the core products load their
17 pages; right?

18 A. I haven't been involved in those studies.

19 Q. Whether you have been involved in them or not, you
20 know that Groupon has done studies that figure out exactly
21 how much more money they make based on how fast the pages
22 load; right?

23 A. I'm assuming that is something teams have looked
24 into.

25 Q. Take a look in your binder, if you would, at

Carlisle - cross

1 Plaintiff's Exhibit 62. 62 is a Product Engineering Review
2 at Groupon; right?

3 A. Yes.

4 Q. And it's from August 2016?

5 A. Yes.

6 Q. And on the next page is the agenda. Do you see that?

7 A. Yes.

8 Q. And it has -- one of the items they're going to talk
9 about is called a latency update. Do you see that?

10 A. Yes.

11 Q. And latency really means how fast your pages are
12 loading; right?

13 A. Or how slowly, yes.

14 Q. Yes, right. Fair point. And then if we jump to the
15 page ending 68005, we see they're going to have the latency
16 update starts on that page; right?

17 A. Yes.

18 Q. And on the very next slide, there is an executive
19 summary. Do you see that?

20 A. Yes.

21 Q. In the executive summary, it says: Since January,
22 we've reduced the deal page TP50 latency on web by
23 .37 seconds. Do you see that?

24 A. Yes.

25 Q. And just by that .37 seconds faster speed, we saw an

Carlisle - cross

1 average improvement of -- oh, I'm sorry -- (-14%) and saw an
2 average improvement of .67 seconds.

3 Sorry. Misread that. The next one is where I
4 was going.

5 Just from those small fraction of a second
6 increases, we calculated that this translates into a \$146 --
7 what is that? -- million per year, right, sir? \$146 million
8 per year by a fraction of a second increase in speed? Did
9 I read that correctly, sir?

10 A. Yes.

11 Q. So Groupon really wants those web pages to load fast
12 from the cache, don't they?

13 A. Yes.

14 Q. And that was just one year, right? \$146 million in
15 one year additional revenue from speeding up the loading of
16 the pages.

17 A. Additional NOB. Yes.

18 Q. Yes, that is what NOB is right. Net Operating.

19 A. Total sales.

20 Q. Total sales, right. Is it fair to say you a get a
21 significant benefit from loading the stuff from the cache,
22 sir?

23 A. Yes.

24 Q. And the same is true on your mobile apps, right?

25 That was the web we just looked at. The same is true on

Carlisle - cross

1 mobile apps; right?

2 A. I'm sorry. Can you repeat the question? What is
3 true on mobile apps?

4 Q. Let's take a look. Turn in your binder to
5 Plaintiff's Exhibit 63. This is another business review or
6 product engineering review; right?

7 A. Yes.

8 Q. And if we just jump to the app latency deep dive on
9 the page ending 68637. 68637.

10 A. Yes.

11 Q. So that \$140 million yearly savings was for the
12 website. Now, if we look at the apps, this says: Improving
13 the TP90 on the iPhone deal page from 27.4 seconds to
14 2 seconds -- again just .4 seconds improvement, right? --
15 would result in a \$35 million lift in annual NOB.

16 And NOB again is revenue; right?

17 A. Yes.

18 Q. And improving the TP90 on the Android deal page from
19 3.2 seconds to 2 seconds would result in a \$42 million lift
20 in annual revenue; right?

21 A. That is what it says here, yes.

22 Q. So by loading the images from cache on the website
23 and the two mobile apps, you have got \$140 something million
24 and another \$70, almost \$80 million. You are talking about
25 over, significantly over \$200 million, almost two

Carlisle - cross

1 and-a-half -- \$200 and a half million annual lift, right?

2 A. Well, what you are saying here is from cache. This
3 is saying just speed in general. It doesn't say anything
4 about caching. And you are saying NOB, not profit. So
5 revenue, our profit is a fraction of our NOB and sales. But
6 ...

7 Q. But it's yearly; right?

8 A. Per year, yes.

9 Q. So it's fair to say speeding up these apps at these
10 websites is pretty important at Groupon; right?

11 A. Yes.

12 Q. Now, one of the other patents in the case is about a
13 method for presenting advertising in an interactive service;
14 right? You know that; right?

15 A. Yes.

16 Q. And that is why you talked about advertising on your
17 direct testimony; right?

18 A. Yes.

19 Q. Let's take a look in the binder, if you would, at
20 Plaintiff's Exhibit 60.

21 This is one of the Groupon web pages that we
22 have been using at the trial so I'll use it even though it's
23 maybe a little bit updated. But you recognize that as a
24 Groupon website; right?

25 A. Yes.

Carlisle - cross

1 Q. And these things that show like the pizza and the
2 fitness classes and the Jiffy Lube, you call those Groupon
3 deal cards; right?

4 A. Yes.

5 Q. And Groupon shows these deal cards on the website to
6 drive people to buy the deals; right?

7 A. Yes.

8 Q. And Groupon uses the location of the customer,
9 sometimes they figure out where the customer is and they try
10 to show them what the customers are going to want that are
11 in the location of the customer; right?

12 A. Yes, that's correct.

13 Q. And Groupon tracks the type of deals customers buy
14 and then modifies what they show, right?

15 A. We try to present the most relevant deals to
16 consumers, so, yes.

17 Q. And you track the characteristics of the consumer,
18 too. You might track their age or their sex or other
19 characteristics about them and tailor deals based on that
20 stuff too; right?

21 A. When we have that information, we try to use it, yes.

22 Q. And this ability to drive deals through images based
23 on people's characteristics or location or whatever is
24 important to Groupon's business; right?

25 A. Yes, there wouldn't be a business if we didn't have

Carlisle - cross

1 products on the shelves, so yes.

2 Q. And then you put these little things on the corner of
3 the deal cards. You call these things badges where this is
4 trending, trending, trending; right? You call those badges?

5 A. Yes.

6 Q. And in Groupon's view, badges is something that makes
7 these deals stand out; right? Sort of encouraging people to
8 buy them; right?

9 A. Yes.

10 Q. Promoting them, if you will, in your words; right?

11 A. Yes, we offer information to try to make the deal
12 stand out.

13 Q. And you are doing that to promote the deals; right?

14 A. We're doing that to give consumers more information
15 about the deals, yes.

16 Q. And if you look at Plaintiff's Exhibit 64, please.

17 This is talking about badges, right?

18 A. Yes.

19 Q. And if we look at it on the overhead.

20 Adding badges to promote these deals on Groupon
21 was a tremendous success and provides almost -- what is
22 that, \$18 -- my eyes are so bad -- \$18.7 million in
23 incremental revenue by just introducing them on to search
24 and discovery.

25 Do you see that?

Carlisle - cross

1 A. Yes.

2 Q. So just by adding promotions to promote these deals,
3 in one year Groupon made an additional \$18.7 million; right?

4 A. Well, this looks like it's an estimate of that. But
5 from an earlier test, yes.

6 Q. But at the end of the day, these images, these deals
7 and the badging, you are trying to get the customer to
8 purchase what Groupon is displaying; right?

9 A. That is why we try to use nice images and things that
10 people will purchase, yes.

11 Q. And you will agree with me, won't you, that the deal
12 cards and the badges are actually -- and these are your
13 words -- promoting Groupon's deals, aren't they?

14 A. Yes, the deal cards are there to promote what we do.

15 Q. And because you are promoting products, services,
16 events, you would agree with me, wouldn't you, that those
17 are advertisements?

18 A. No, I would not, sir.

19 Q. You wouldn't?

20 A. No. And I'm happy to explain why.

21 Q. That's okay. I'll ask the questions and then we can
22 move forward, because I knew you were going to say that.

23 So last night I looked on Google what the
24 definition of "advertisement" is. Let's take a look.

25 If you put "advertisement definition" in Google,

Carlisle - cross

1 the very first definition that pops up is this one: An
2 advertisement is a notice or announcement in a public medium
3 promoting a product, service, or event.

4 Do you see that, sir?

5 A. Yes.

6 Q. And we can go down and look at other definitions,
7 too. We can look at Merriam-Webster. Merriam-Webster says
8 the same thing: Presenting to the public to help sell a
9 product or to make an announcement.

10 We can look at the Oxford English Dictionary.
11 It says the same thing: A notice or announcement in a
12 public medium promoting a product, service, or event.

13 Do you'd see that, sir?

14 A. Yes.

15 Q. And there is no doubt you are promoting your deals
16 with your images and your badges; right, sir?

17 A. Those are the images and deals. Images of the deals
18 we sell in the store. So those are the things that people
19 are buying.

20 Q. Now, you also advertise your products generally,
21 right? Groupon advertises its products?

22 A. On the product sites, yes.

23 Q. Like Facebook, for instance?

24 A. Correct.

25 Q. And you advertise products on radio?

Carlisle - cross

1 A. Yes.

2 Q. TV?

3 A. Yes.

4 Q. Through e-mail?

5 A. So.

6 Q. Push notifications.

7 A. E-mails and push notifications, those are
8 merchandising messages that Groupon send out.

9 Q. And Groupon tests its website; right?

10 A. Sorry.

11 Q. Groupon tests its websites and its mobile apps and
12 its touch; right?

13 A. Yes.

14 THE COURT: Mr. Desmarais, I have the jury for
15 about one more minute. You are not that close to finishing,
16 are you?

17 MR. DESMARAIS: I actually will be finished in
18 less than a minute, Your Honor.

19 BY MR. DESMARAIS:

20 Q. And Groupon operates an e-commerce space; right?

21 A. Yes.

22 Q. And in fact, you're a local e-commerce player, you
23 call yourself; correct?

24 A. That's correct.

25 Q. And the local e-commerce is over a trillion dollars

Carlisle - cross

1 worldwide. That is the fact; right?

2 A. Yes, if you are working with every merchant
3 worldwide.

4 Q. And Groupon considers Amazon to be a competitor;
5 right?

6 A. Yes.

7 Q. And you consider Facebook to be a competitor; right?

8 A. Competitor. A competitive risk.

9 Q. And you consider Google to be a competitor; right?

10 A. Again, competitive risk. Yes.

11 Q. And you know, sir, don't you that Amazon, Facebook,
12 and Google all took licenses to these IBM patents. You know
13 that, don't you?

14 A. I heard that they licensed a broad array of patents
15 from IBM.

16 Q. But Groupon has not, correct?

17 A. That's correct.

18 MR. DESMARAIS: No further questions.

19 THE COURT: Thank you.

20 Is there going to be any redirect.

21 MS. SHAMILOV: There will be. And it will be
22 longer.

23 THE COURT: All right. Then we'll hold off in
24 until the morning.

25 Just hold there for a moment, Mr. Carlisle.

1 Ladies and gentlemen of the jury, that is the
2 time of our time together today. Tomorrow, we only have you
3 from 9:00 until 1:00 so there won't be lunch, but we'll let
4 you start your weekend at 1:00 o'clock.

5 But tonight, please, no talking about the case,
6 no research or reading anything related to the case. Enjoy
7 your evening. We'll see you tomorrow morning.

8 (Jury left courtroom.)

9 THE COURT: All right. Mr. Carlisle, you may
10 step down. We'll see you tomorrow.

11 THE WITNESS: Okay.

12 THE COURT: I have another matter I have to go
13 attend to. So the motions, if you want to argue them or
14 whatever, we'll do that tomorrow morning at 8:30, but what
15 should we expect tomorrow? And it's a short day.

16 MS. SHAMILOV: We have Mr. Dunham next. We
17 might have demonstrative issues to resolve. I assume you
18 want us to preserve our JMOL 50(a) tomorrow morning, 8:30
19 tomorrow.

20 THE COURT: That's what I meant to say: Motions
21 at 8:30 in the morning, but in terms of Mr. Dunham.

22 MS. SHAMILOV: There might be two more
23 witnesses. We have three more fact witnesses to call. I
24 don't think we'll have -- we won't be able to fit them all
25 in tomorrow. It's a short day.

1 THE COURT: Right. Okay. We'll see you at 8:30
2 tomorrow morning. Have a good evening.

3 (Proceedings adjourn at 4:34 p.m.)
4

5 I hereby certify the foregoing is a true and accurate
6 transcript from my stenographic notes in the proceeding.

7 /s/ Brian P. Gaffigan
8 Official Court Reporter
9 U.S. District Court
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